A

LIM SWEE CHOO & ANOR v. ONG KOH HOU & ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
ABDUL RAHMAN SEBLI CJ (SABAH & SARAWAK)
ZABARIAH MOHD YUSOF FCJ
B
RHODZARIAH BUJANG FCJ
AB KARIM AB JALIL FCJ
AHMAD TERRIRUDIN MOHD SALLEH FCJ
[CIVIL APPEAL NOS: 02(f)-22-07-2024(W) & 02(f)-23-07-2024(W)]
2 OCTOBER 2025

C

Abstract – *For a breach to have the effect of entitling an innocent party to terminate a contract, it must be either: (i) a breach of condition; (ii) a sufficiently serious breach of an innominate/intermediate term; or (iii) a repudiation of the contract. The legal principles governing the*
D
award of restitutionary remedies have no application in determining whether a contract should be terminated for breach. A claim for restitution is available when there is a total failure of consideration. The applicable test for total failure of consideration is not whether the promisee has received a specific benefit but rather whether the promisor
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has performed any part of the contractual duties in respect of which payment is due.

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CONTRACT: *Agreement – Assignment agreement – Assignor purchased four lands from developer – Assignment of four lands from assignor to assignee under assignment agreement – Breach by assignee's subsequent, unilateral sale and purchase agreement with developer for only three parcels at significantly higher price – Validity and enforceability of assignment of rights under earlier sale and purchase agreement – Whether assignee's unconscionable conduct barred claim for restitution against assignor*

G

CONTRACT: *Agreement – Sale and purchase agreement – Breach – Restitution – Assignor entered sale and purchase agreements for purchase of four lands from developer – Assignment of four lands from assignor to assignee under assignment agreement – Breach by assignee's subsequent, unilateral sale and purchase agreement with developer for only three parcels at significantly higher price – Claim for return*
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of money paid – Applicable test for total failure of consideration – Whether focus on promisor's performance of contractual duties or whether promisee received specific benefit – Whether assignor had performed contractual duties under assignment agreement – Whether assignee entitled to restitution – Whether Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd good law

I

The appellants ('plaintiffs') had entered into a sale and purchase agreement ('SPA') with DA Land Sdn Bhd ('DA Land') for the purchase of four vacant parcels of land ('Rawang 4') at the purchase price of RM23 million ('SPA dated 23 June 2015'). One of the lands was under a caveat. Thereafter, the plaintiffs assigned their rights and interests in Rawang 4 to the respondent ('defendant') by way of an assignment agreement for RM25.5 million with the purported knowledge and consent of DA Land ('assignment agreement dated 20 October 2015'). In total, the defendant had paid RM23 million to the plaintiffs. Under the assignment agreement, the plaintiffs had also assigned their rights, title and interests under the SPA dated 23 June 2015 to the defendant, including the RM23 million they had paid to DA Land under the said SPA. Parties also agreed that Rawang 4 shall be transferred directly from DA Land to the defendant. Following a dispute between the plaintiffs and DA Land, a consent judgment was entered whereupon the plaintiffs admitted that they had no right, claim or caveatable interest over Rawang 4. Unbeknown to the plaintiffs, the defendant entered into an SPA with DA Land for the re-purchase of three lots of Rawang 4, excluding the one with the caveat, for RM84 million ('Rawang 3'). The consideration of the RM25.5 million paid under the assignment agreement to the plaintiffs, of which a total sum of RM23 million was paid directly by the plaintiffs to DA Land under the SPA dated 23 June 2015, was declared as the deposit to DA Land. The first plaintiff had, *inter alia*, demanded for the defendant to pay RM2.5 million due to the defendant's alleged breach of the assignment agreement and the supplemental assignment agreement. However, a dispute arose between the defendant and DA Land, culminating in, DA Land's suit against the defendant and the defendant's suit against DA Land, which were heard together at the High Court. The High Court held that, *inter alia*: (i) DA Land was entitled to terminate the SPA and forfeit the deposit paid of RM23 million as a result of the defendant's failure to pay the balance of the purchase price of RM61 million on or before the completion date; (ii) the defendant admitted to not having paid anything to DA Land and that the defendant was an unlicensed moneylender; (iii) the supplementary agreements, which formed part of the SPA, were sham transactions tainted with illegality and therefore, void; and (iv) in relation to the payment of the deposit, there was no certainty as to the actual amounts allegedly paid by the defendant to DA Land under the SPA. The plaintiffs sought, *inter alia*, a declaration that the defendant had breached the assignment agreement dated 20 October 2015 and the supplemental assignment agreement and pursued the balance payment of RM2.5 million as special damages against the defendant through a suit at the High Court ('main suit'). The defendant, on the other hand, counterclaimed for the return of RM23 million it paid to the plaintiffs. It was the finding of the High Court and the Court of Appeal that the SPA dated 23 June 2015 and the assignment agreement dated 20 October 2015 and the supplemental assignment agreement were valid. The High Court and the Court of Appeal referred to *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* ('*Berjaya Times Square*') and *Damansara Realty Bhd v. Bungsar Hill*

Holdings Sdn Bhd ('*Damansara Realty*') in support of their findings that there was a total failure of consideration thereby justifying the dismissal of the plaintiffs' claim against the defendant. The Court of Appeal concluded that the plaintiffs were liable to return the sum of RM23 million to the defendant and that the plaintiffs were not entitled to claim the remaining RM2.5 million under the assignment agreement and the supplemental assignment agreement from the defendant. Hence, the present appeals by the plaintiffs.

Held (allowing appeals)
Per Ahmad Terrirudin Mohd Salleh FCJ delivering the judgment of the court:

(1) The SPA dated 23 June 2015, the assignment agreement dated 20 October 2015 and the undated supplemental assignment agreement, entered between the plaintiffs and the defendant were valid and enforceable. The same, however, could not be said about the defendant's SPA with DA Land. The defendant could not maintain any claim in restitution against the plaintiffs. (paras 97, 98 & 100)

(2) The High Court ruled that there was no certainty regarding the actual amounts paid by the defendant and that the defendant failed to provide evidence to prove the payment of RM23 million. Despite these uncertainties, the High Court ruled that DA Land was entitled to forfeit the deposit based on the contractual terms of the defendant's SPA. This showed that the forfeiture was enforced as a legal consequence of the SPA regardless of whether the deposit had been fully paid in the conventional sense. In other words, what was forfeited was the defendant's contractual right to claim the RM23 million deposit from DA Land rather than any actual transfer of funds. The RM23 million purportedly paid by the defendant to DA Land was not a separate and distinct amount but, in reality, related to the same RM23 million paid to the plaintiffs. (paras 108 & 109)

(3) What was rather striking was the absence of cogent explanation as to why the defendant would need to abandon the binding assignment agreement and the plaintiffs' SPA with DA Land and instead enter into a separate SPA to purchase three out of the four parcels of land at the staggering price of RM84 million. This did not reflect the measured business judgment of a reasonably prudent purchaser. Additionally, given that the assignment carried a contractual value of RM25.5 million, a reasonable prudent assignee in the ordinary course of business would have been expected to act with due diligence by verifying the position with DA Land at the time of signing the assignment agreement dated 20 October 2015. This was especially so as para. 12 of the recitals expressly referred to DA Land's consent to the said assignment. (para 119)

(4) The defendant was the architect of his own loss and misfortune by his subsequent unilateral dealing with DA Land. The plaintiffs, however, were not involved in the defendant's subsequent SPA with DA Land, which was done without their knowledge. What the defendant was effectively attempting to do now was to recover the same sum of RM23 million through a different route and by invoking a purported new cause of action. It would be manifestly unconscionable for the defendant to claim for restitution of the amount against the plaintiffs, more so on monies that the defendant himself had not paid. Equity would not permit the defendant to reclaim the amount from the plaintiffs on the ground of a total failure of considerations. The defendant's unconscionable conduct barred his claims for restitution and unjust enrichment. (para 128)

(5) The plaintiffs had assigned their rights, title and interest in Rawang 4 and to the SPA to the defendant and had agreed that the lands be transferred directly from DA Land to the defendant. The consideration or basis for the payment of RM25.5 million by the defendant was the said assignment with the knowledge and consent of DA Land. In that context, the plaintiffs had performed their contractual duties under cl. 1 of the assignment agreement in respect of which the payment of RM25.5 million was due. The defendant enjoyed the benefits of the assignment which: (i) allowed him to deal directly with DA Land in respect of Rawang 4 though he then sought to enter into a SPA with DA Land without the knowledge of the plaintiffs; and (ii) enabled him to misapply the RM23 million paid by the plaintiffs to DA Land under the plaintiffs' SPA as a deposit under the defendant's SPA with DA Land. (para 146)

(6) The defendant had deprived the plaintiffs of the benefit they were entitled to as consideration for assigning their rights to Rawang 4, namely RM2.5 million, which represented their investment in Rawang 4. The plaintiffs suffered this loss due to the defendant's breach of the assignment agreement and his unilateral dealings with DA Land. Following the defendant's breach, no investment in Rawang 4 could ever materialise. (para 154)

(7) The judicial focus of the inquiry must remain on the performance of the anticipated promise which formed the basis for the transfer of the relevant benefit or for which payment was due or made. Therefore, the law took a different course following *Berjaya Times Square* and *Damansara Realty* in so far as the doctrine of total failure of consideration was concerned and conflating it with the right to rescind or terminate a contract. These rulings have conflated the doctrine of total failure of consideration for recovery of monies paid with recovery for breach of contract based upon termination or rescission. Accordingly, these rulings left the application of the doctrine of total failure of

consideration in a state of uncertainty of the principle and tests applicable for both: (i) rescission or termination of a contract for breach; and (ii) restitution in cases of a total failure of consideration. The law must be clarified. *Berjaya Times Square* could no longer be regarded as good law. (paras 164 & 165)

Bahasa Melayu *Headnotes*

Perayu-perayu ('plaintif-plaintif') memasuki perjanjian jual beli ('PJB') dengan DA Land Sdn Bhd ('DA Land') untuk membeli empat bidang tanah kosong ('Rawang 4') dengan harga belian RM23 juta ('PJB bertarikh 23 Jun 2015'). Salah satu tanah itu mempunyai kaveat. Selepas itu, plaintif-plaintif menyerahhakan hak-hak dan kepentingan dalam Rawang 4 pada responden ('defendan') melalui perjanjian serah hak pada harga RM25.5 juta dengan pengetahuan dan persetujuan DA Land ('perjanjian serah hak bertarikh 20 Oktober 2015'). Secara keseluruhannya, defendan sudah membayar RM23 juta pada plaintif-plaintif. Bawah perjanjian serah hak, plaintif-plaintif juga menyerahhakan hak-hak, hak milik dan kepentingan bawah PJB bertarikh 23 Jun 2015 pada defendan, termasuk RM23 juta yang dibayar pada DA Land bawah PJB. Pihak-pihak juga bersetuju bahawa Rawang 4 akan dipindahkan terus daripada DA Land kepada defendan. Berikutan pertikaian antara plaintif-plaintif dan DA Land, satu perjanjian persetujuan dimasuki dan plaintif-plaintif mengakui mereka tiada hak, tuntutan atau kepentingan boleh dikaveat terhadap Rawang 4. Tanpa diketahui plaintif-plaintif, defendan memasuki PJB dengan DA Land untuk membeli balik tiga lot dalam Rawang 4, tidak termasuk yang telah dikaveat, pada harga RM84 juta ('Rawang 3'). Balasan RM25.5 juta dibayar bawah perjanjian serah hak pada plaintif-plaintif, yang mana jumlah RM23 juta dibayar terus oleh plaintif-plaintif pada DA Land bawah SPA bertarikh 23 Jun 2015, yang diiktiraf sebagai deposit untuk DA Land. Plaintif pertama, antara lain, menuntut defendan membayar RM2.5 juta disebabkan pelanggaran perjanjian serah hak oleh defendan dan perjanjian serah hak tambahan. Walau bagaimanapun, pertikaian timbul antara defendan dan DA Land menyebabkan guaman DA Land terhadap defendan dan guaman defendan terhadap DA Land, yang dibicarakan bersama di Mahkamah Tinggi. Mahkamah Tinggi memutuskan, antara lain: (i) DA Land berhak membatalkan PJB dan merampas deposit yang dibayar berjumlah RM23 juta ekoran kegagalan defendan membayar baki harga belian RM61 juta pada atau sebelum tarikh penyelesaian; (ii) defendan mengakui tidak membayar apa-apa pada DA Land dan defendan adalah peminjam wang tanpa lesen; (iii) perjanjian tambahan, yang membentuk sebahagian PJB, adalah transaksi palsu yang tercemar oleh ketaksahan dan oleh itu, terbatal; dan (iv) berkaitan bayaran deposit, tiada ketentuan berkaitan jumlah sebenar yang kononnya dibayar oleh defendan kepada DA Land bawah PJB. Plaintif-plaintif memohon, antara lain, satu deklarasi bahawa defendan melanggar perjanjian serah hak bertarikh 20 Oktober 2015 dan perjanjian serah hak tambahan dan memohon baki bayaran RM2.5 juta sebagai ganti rugi khas terhadap

defendan melalui guaman di Mahkamah Tinggi ('guaman utama'). Sebaliknya, defendan menuntut balas untuk pemulangan RM23 juta yang dibayar pada plaintif-plaintif. Mahkamah Tinggi dan Mahkamah Rayuan mendapati bahawa PJB bertarikh 23 Jun 2015 dan perjanjian serah hak bertarikh 20 Oktober 2015 dan perjanjian serah hak tambahan adalah sah. Mahkamah Tinggi dan Mahkamah Rayuan merujuk pada *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* ('*Berjaya Times Square*') dan *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd* ('*Damansara Realty*') untuk menyokong dapatan-dapatan bahawa terdapat kegagalan balasan yang mewajarkan penolakan tuntutan plaintif-plaintif terhadap defendan. Mahkamah Rayuan menyimpulkan bahawa plaintif-plaintif bertanggungan mengembalikan jumlah RM23 juta pada defendan dan plaintif-plaintif juga tidak berhak menuntut baki RM2.5 juta bawah perjanjian serah hak dan perjanjian serah hak tambahan daripada defendan. Oleh itu, rayuan-rayuan ini oleh plaintif-plaintif.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Ahmad Terrirudin Mohd Salleh HMP menyampaikan penghakiman mahkamah:

(1) PJB bertarikh 23 Jun 2015, perjanjian serah hak bertarikh 20 Oktober 2015 dan perjanjian serah hak tambahan tidak bertarikh, dimasuki antara plaintif-plaintif dan defendan adalah sah dan boleh dikuatkuasa. Walau bagaimanapun, yang sama tidak boleh dikatakan terhadap PJB defendan dengan DA Land. Defendan tidak boleh mengekalkan apa-apa tuntutan dalam restitusi terhadap plaintif-plaintif.

(2) Mahkamah Tinggi memutuskan bahawa tiada kepastian tentang jumlah sebenar yang dibayar defendan dan bahawa defendan gagal memberi keterangan untuk membuktikan bayaran RM23 juta. Walaupun dengan ketidakpastian ini, Mahkamah Tinggi memutuskan bahawa DA Land berhak merampas deposit berdasarkan terma-terma kontrak PJB defendan. Ini menunjukkan rampasan tersebut dilaksanakan sebagai akibat undang-undang PJB tanpa mengira sama ada deposit telah dibayar penuh dalam erti kata konvensional. Dalam kata lain, yang dirampas adalah hak kontrak defendan untuk menuntut RM23 juta deposit daripada DA Land dan bukan pemindahan dana sebenar.

(3) Apa yang ketara adalah ketiadaan penjelasan mengapa defendan perlu mengabaikan perjanjian serah hak yang mengikat dan PJB plaintif-plaintif dengan DA Land dan sebaliknya memasuki PJB berasingan untuk membeli tiga daripada empat bidang tanah pada harga berperingkat RM84 juta. Ini tidak menggambarkan penilaian perniagaan wajar oleh pembeli berhemat. Tambahan lagi, oleh sebab penyerahan hak mempunyai nilai kontrak berjumlah RM25.5 juta, pemegang serah hak yang berhemat dalam perjalanan perniagaan biasa diharap akan

bertindak secara wajar dengan mengesahkan kedudukan dengan DA Land semasa menandatangani perjanjian bertarikh 20 Oktober 2015. Ini khususnya kerana perenggan 12 kata mula merujuk pada persetujuan DA Land terhadap penyerahan hak itu.

(4) Defendan sendiri menjadi penyebab kerugian dan nasib malangnya kerana urusan terkemudian sebelah pihak dengan DA Land. Plaintif-plaintif, walau bagaimanapun, tidak terlibat dalam PJB dengan DA Land yang terkemudian, yang dimasuki tanpa pengetahuan mereka. Apa yang defendan cuba lakukan sekarang adalah mendapatkan kembali jumlah RM23 juta yang sama melalui cara lain dan dengan kononnya membangkitkan kausa tindakan baharu. Amat tidak berpatutan untuk defendan menuntut restitusi jumlah tersebut terhadap plaintif-plaintif, lebih-lebih lagi wang yang tidak dibayar oleh defendan sendiri. Ekuiti tidak akan membenarkan defendan menuntut kembali jumlah itu daripada plaintif-plaintif atas alasan kegagalan balasan. Tindakan tidak berpatutan oleh defendan ini menghalang tuntutannya untuk restitusi dan pengayaan tidak wajar.

(5) Plaintif-plaintif telah menyerahhakan hak-hak, hak milik dan kepentingan mereka dalam Rawang 4 dan dalam PJB kepada defendan dan bersetuju agar tanah-tanah itu dipindah milik terus daripada DA Land kepada defendan. Balasan atau asas untuk bayaran RM25.5 juta oleh defendan adalah penyerahan hak itu dengan pengetahuan dan persetujuan DA Land. Dalam konteks itu, plaintif-plaintif, dengan itu, telah melaksanakan kewajipan kontrak mereka bawah kl. 1 perjanjian serah hak yang berkaitannya bayaran RM25.5 juta tertunggak. Defendan telah mendapat faedah penyerahan hak yang: (i) membenarkannya berurusan secara terus dengan DA Land berkaitan Rawang 4 walaupun kemudian dia mencuba untuk memasuki PJB dengan DA Land tanpa pengetahuan plaintif-plaintif; dan (ii) membolehkannya menyalahgunakan jumlah RM23 juta yang dibayar plaintif-plaintif kepada DA Land bawah PJB plaintif-plaintif sebagai deposit bawah PJB defendan dengan DA Land.

(6) Defendan menafikan plaintif-plaintif faedah yang mereka berhak sebagai balasan penyerahan hak hak-hak mereka dalam Rawang 4, iaitu RM2.5 juta, yang mewakili jumlah pelaburan mereka dalam Rawang 4. Plaintif-plaintif mengalami kerugian akibat pelanggaran perjanjian serah hak oleh defendan dan urusan sebelah pihaknya dengan DA Land. Berikutan pelanggaran defendan, tiada pelaburan dalam Rawang 4 yang akan menjadi kenyataan.

(7) Tumpuan siasatan kehakiman perlu kekal pada pelaksanaan janji yang dijangkakan yang membentuk asas pindah milik faedah relevan atau untuk yang mana bayaran tertunggak atau telah dibuat. Oleh itu, undang-

undang mengambil pendekatan berbeza berikutan *Berjaya Times Square* dan *Damansara Realty* setakat yang berkait dengan doktrin kegagalan balasan sama sekali dan menggabungkannya dengan hak membatalkan atau menamatkan kontrak. Keputusan-keputusan tersebut menggabungkan doktrin kegagalan balasan sama sekali untuk pengembalian wang yang telah dibayar dengan mendapatkan semula disebabkan pelanggaran kontrak berdasarkan penamatan atau pembatalan. Oleh itu, keputusan-keputusan ini menjadikan doktrin kegagalan balasan sama sekali dalam keadaan tiada kepastian prinsip dan ujian yang boleh diguna pakai untuk kedua-duanya: (i) pembatalan atau penamatan kontrak kerana pelanggaran; dan (ii) restitusi dalam kes-kes kegagalan balasan sama sekali. Undang-undang perlu dijelaskan. *Berjaya Times Square* bukan lagi undang-undang sah.

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Johnson & Anor v. Agnew [1980] AC 367 ***(refd)***

A *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2005] 2 CLJ 914 CA* ***(refd)***
Kartar Singh v. Pappa [1954] CLJU 32; [1954] 1 LNS 32 HC ***(refd)***
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC ***(refd)***
Lim Ah Moi v. AMS Periasamy Suppiah Pillay [1997] 3 CLJ 629 CA ***(refd)***
Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 SC ***(refd)***
B *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd [1994] AC 85* ***(refd)***
Ling Peek Hoe & Anor v. Ding Siew Ching & Another Appeal [2017] 7 CLJ 641 FC ***(refd)***
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Mahiaddin Md Yasin v. PP [2024] 10 CLJ 924 CA ***(refd)***
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C *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC* ***(refd)***
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Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi
E *Mukhtar [2020] 1 CLJ 1 FC* ***(refd)***
R (On The Application of Quintavalle) v. Secretary Of State For Health [2003] 2 All ER 113 ***(refd)***
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Roberts v. Jules Consultancy Ltd [2021] NZCA 303 ***(refd)***
F *Roxborough And Others v. Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335* ***(refd)***
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Shanghai Tongji Science & Technology Industrial Co Ltd v. Casil Clearing Ltd [2004] HKCU 380 ***(refd)***
Stocznia Gdanska SA v. Latvian Shipping Co [1998] 1 WLR 574 ***(refd)***
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G *560 CA* ***(refd)***
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White v. Blackmore [1972] 3 All ER 158 ***(refd)***
White v. Jones [1993] 3 All ER 481 ***(refd)***
I *Yeap Hock Seng v. Minister for Home Affairs, Malaysia & Ors [1975] CLJU 207; [1975] 1 LNS 207* ***(refd)***

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Visu Sinnadurai, *Law of Contract*, 2023, 5th edn, LexisNexis, vol 2, pp 1161-1165

For the appellants - Cyrus V Das, Low Weng Tchung, Jaden Phoon Wai Ken & Adeline Tan Shu Phing; M/s Adeline, Phoon & Co
For the respondent - Alfred Lai Choong Wui, Toh Mei Swan, Ho Weng Sze, Yew Jing Yi & Jonathan Gerard; M/s Alfred Lai & Partners

[Editor's note: For the Court of Appeal judgment, please see Lim Swee Choo & Anor v. Ong Koh Hou & Another Appeal [2024] 6 CLJ 811 (overruled); For the High Court judgment, please see [2022] CLJU 1118; [2022] 1 LNS 1118 (overruled).]

Reported by Lina E & Barathi

JUDGMENT

Ahmad Terrirudin Mohd Salleh FCJ:

Introduction

[1] These appeals raise novel points of law concerning the Malaysian position on the common law restitutionary doctrine of total failure of consideration in light of this court's prior rulings in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2009] 3 MLRA 1 and *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257; [2012] 1 MLRA 311. These rulings have since been frequently applied by the lower courts and have garnered considerable attention from both legal scholars and practitioners. Much judicial and academic ink has been spilt analysing the legal developments introduced by these rulings. In this judgment, parties will be referred to as they were in the High Court.

[2] Through a letter dated 18 December 2024, the Registry of the Federal Court received an application from learned counsel for the plaintiffs for these appeals to be heard by a panel larger than that which heard the above two cases in light of the plaintiffs' leave questions 4 and 5. This request was granted.

[3] We heard the appeal on 24 January 2025 and, *curia advisari vult*, delivered our broad grounds on 8 April 2025 whereupon, having heard both learned counsel and after anxious consideration, we were constrained to allow the appeals. This is the full grounds of our unanimous decision.

[4] The present appeals, in essence, concern the assignment agreements involving four vacant parcels of land assigned by the plaintiffs to the defendant for a consideration. These lands were acquired through a sale and purchase agreement ("SPA") between the plaintiffs and a land developer who itself subsequently became involved in a broader sequence of separate proceedings involving the plaintiffs, on the one hand, and the defendant, on the other.

[5] The proceedings between the plaintiffs and defendant in the courts below proceeded on the legality of these contracts as the central issues for judicial determination and the leave questions framed by the plaintiffs primarily concern the parties' rights and liabilities arising from these contractual arrangements.

[6] The plaintiffs filed Appeal No. 23 against the Court of Appeal's dismissal of their appeal and filed Appeal No. 22 against the Court of Appeal's decision allowing the defendant's appeal against the High Court's dismissal of the counterclaim.

Background Of Facts

[7] While the facts of these appeals are not entirely straightforward, they remain sufficiently clear for determination owing to the meticulous efforts of learned counsel in their written submissions and the documents within the appeal records. The facts of the appeals are largely uncontentious. For ease of reference, we set out diagrams illustrating the factual narrative and the relevant timeline of events at the end of this part of the judgment.

[8] The plaintiffs entered into a SPA dated 23 June 2015 with DA Land Sdn Bhd ("DA Land") for the purchase of four vacant parcels of land held under (i) Geran 124341 Lot 25032; (ii) Geran 54446 Lot 18057; (iii) Geran 62373 Lot 15751; and (iv) Geran 124342 Lot 25033 all in the District of Gombak, Mukim Rawang, Selangor ("Rawang 4") at the purchase price of RM23,000,000. Both parties were aware at the material time that one piece of these lands was under a caveat lodged by one Ho Fook Cheoy ("Ho's caveat"). Under this SPA, it was DA Land's contractual obligation to remove Ho's caveat and to deliver vacant possession free from the encumbrance of Ho's caveat. Section 5 of the Second Schedule of the SPA provides as follows:

5. Private Caveat/Encumbrance On The Said Property

The parties hereto are aware that there is a private caveat lodged by Ho Fook Cheoy (NRIC NO: 6XXX30-07-XXXX) (hereinafter referred to as "the Caveator") *vide* Presentation No: 44894/2014 on 23/7/2014 (hereinafter referred to as "the said Caveat") against the said Property held under Geran 124342 Lot 25033 Mukim Rawang. The Vendor(s) shall and hereby undertake to cause the said Caveat to be withdrawn or removed within six (6) months from the date hereof falling which provisions of Section 4 of this Schedule shall apply without waiting for the expiry of the Cooling-off Period. All monies paid to the Caveator (if any) and all costs and expenses incurred in removing such caveat shall be a debt due by the Vendor(s) to the Purchaser(s).

[9] Thereafter, the plaintiffs assigned all their rights and interests in Rawang 4 to the defendant by way of the assignment agreement dated 20 October 2015 for RM25,500,000 with the purported knowledge and consent of DA Land. Paragraph 12 of the recital in the assignment agreement provides:

(12) DA Land has *vide* a letter dated 2 October 2015 agreed and consented to the assignment by the First Party of all the First Party's rights titles and interest in and to the said Land and under the SPA to the Second Party.

An undated acknowledgement letter issued by DA Land, bearing the signatures of its directors and shareholders (the "Chew Brothers"), is relied upon by the plaintiffs as evidence of DA Land's knowledge of and consent to the said assignment agreement. The letter states as follows:

Re: Sale of the following lands

Geran	Lot
124341	25032
124342	25033
54446	18057
62372	15751

Mukim Rawang

Vendor: DA Land Sdn Bhd

Purchases: Ong Koh Hou @ Won Kok Fong

This is to acknowledge that Mr. Ong Koh Hou @ Won Kok Fong has on this day paid to Lim Swee Choo and Chiam Eng Huat @ Chiam Eng Hong at our request the sum of Ringgit Twenty Five Million Five Hundred Thousand (RM25,500,000.00) only which is deemed to be and taken by us as part payment towards the purchase by him from us of the above Lands.

[10] Through the assignment agreement and an undated supplemental assignment agreement, this RM25,500,000 is to be settled as follows:

(i) a sum of RM20,000,000 from the purchase price paid by the plaintiffs to DA Land shall be set-off against the first plaintiff's debt owing to the defendant;

(ii) the balance sum of RM3,000,000 shall be paid directly to the plaintiffs; and

(iii) the balance sum of RM2,500,000 shall be treated as the plaintiffs' investment in Rawang 4 representing 4.5% of the value of the lands.

The following contract clauses and a letter dated 2 October 2015 respectively reflect the above payment arrangements:

(i) sub-paragraph 10(a) of the recital in the assignment agreement provides as follows:

> By an agreement in writing dated 2.10.2015 made between one of the First Party Lim Swee Choo (F) (NRIC No: 6XXXX3-XX-XXXX) and also acting on behalf of the other First Party Chiam Eng Huat @ Chiam Eng Hong (NRIC No: 4XXXX7-XX-XXXX) of the one part and the Second Party of the other part, the Second Party has agreed to pay to Lim Swee Choo and also acting on behalf of Chiam Eng Huat @ Chiam Eng Hong the new Purchase Price RM25,500,000.00 in the manner as follows:
>
> (a) by way of set-off/contra with Lim Swee Choo (F) (NRIC No: 6XXXX3-XX-XXXX) of the debts amounting to Ringgit Malaysia Twenty Million (RM20,000,000.00) only due and owing from Lim Swee Choo (F) to the Second Party inclusive of the debts under two (2) Agreement dated 29.9.2013 and 31.10.2013 respectively.

(ii) in so far as relevant, a letter dated 2 October 2015 issued by the first plaintiff to the defendant provides as follows:

> Mr. Ong Koh Hou @ Won Kok Fong
>
> I, Lim Swee Choo (NRIC No. 6XXXX3-XX-XXXX) acknowledge as follows:
>
> (1) Contra with you the sum of Ringgit Twenty Million (RM20,000,000.00) (being the amount presently owed by me to you) for the same amount of RM20,000,000.00 which I and Mr. Chiam Eng Huat @ Chiam Eng Hong had paid to DA Land Sdn Bhd for purchase of 4 pieces of lands held under Geran 124341-2, 54446 and 62372 for lots 25032-3, 18057 and 15751 respectively in the Mukim of Rawang (said Lands).

(2) Receiving from you the following cheques:

UOB 299516 for	RM3,000,000.00
RHB 000073 for	RM2.500.000.00
	RM5,500,000,00

both dated 02 October 2015

being the balance of the amount which I and Mr Chiam Eng Huat @ Chiam Eng Hong had paid to DA Land Sdn Bhd for purchase of the said Lands.

(3) The above total sum of RM25,500,000.00 fully settle our proposed purchase of the said Lands from DA Land Sdn Bhd and the agreement thereon shall hereby be deemed to be released and mutually terminated.

(iii) paragraphs 2 and 3 of the supplemental assignment agreement provide as follows:

2. The parties hereto hereby expressly agree that the Second Party need not deposit the said Security Sum with the Second Party's Solicitors as stakeholders instead it is mutually agreed that the said Security Sum shall be dealt with in. the following manner:

2.1 the Second Party shall release part of the said Security Sum amounting to Ringgit Malaysia Three Million (RM3,000,000.00) only directly to the First Party upon the execution of this Agreement;

2.2 the balance of the said Security Sum amounting to Ringgit Malaysia Two Million and Five Hundred Thousand (RM2,500,000.00) only shall be treated as the First Party's investment in the said Land upon the successful completion of the registration of the transfer of the said Land in favour of the Second Party.

3. It is also mutually agreed that the said sum of Ringgit Malaysia Two Million and Five Hundred Thousand (RM2,500,000.00) only shall represent 4.5% of the value of the said Land.

[11] In total, the defendant had paid RM23,000,000 to the plaintiffs. Under the assignment agreement, the plaintiffs also assigned their rights, title and interest under the SPA dated 23 June 2015 to the defendant including the RM23,000,000 they had paid to DA Land under that SPA. Clause 1 of the assignment agreement provides as follows:

1. In consideration of the new Purchase Price of Ringgit Malaysia Twenty-Five Million and Five Hundred Thousand (RM25,500,000.00) only paid by the Second Party, the receipt of which the First Party expressly acknowledged and in further consideration of the Second Party agreeing to be bound by the terms and conditions of the SPA and the provisions herein contained, the First Party HEREBY ASSIGNS ABSOLUTELY

A UNTO to the Second Party and the Second Party hereby accepts all the rights title and interest of the First Party in the said Land and to the SPA and the full benefits granted thereby and stipulations contained therein and all remedies for enforcing the same.

[12] Parties also agreed that Rawang 4 shall be transferred directly from B DA Land to the defendant. Clause 2 of the assignment agreement provides as follows:

2. Upon the execution of this Agreement, the First Party shall forthwith nominate the Second Party as the transferee of the said Land and shall ensure that the Second Party shall be entitled to execute the relevant C Memorandums of Transfer as the transferee of the said Land without any objections or obstruction from DA Land or any third party.

[13] Clause 3 of the assignment agreement, in turn, spells out the plaintiffs' obligation to the defendant in relation to any caveat on Rawang 4 as follows:

The First Party shall, simultaneously with the execution hereof, do all acts D and things and to execute or cause to be executed all the relevant documents and instruments to transfer the said Land together with all the rights and benefits under the SPA to the Second Party free from any claims, caveats, charges and/or encumbrances and deposit the same with the Second Party's Solicitors as stakeholders.

E **[14]** Further, the plaintiffs' SPA with DA Land dated 23 June 2015 is referred to in the assignment agreement. Clause 4A of the assignment agreement provides as follows:

4A. Simultaneously with the execution of this Agreement, the First Party shall deposit with the Second Party's Solicitors as stakeholders the duly F stamped and original documents as follows:

(1) Sale and Purchase Agreement dated 23 June 2015;

(2) 1st, 2nd, 3rd and 4th supplemental Agreement;

(3) Agreement dated 2 October 2015;

G (4) DA Land's letter dated 2 October 2015;

[15] Following a dispute between the plaintiffs and DA Land which led to the Kuala Lumpur High Court Suit No. 22NCVC-688-12/2015 ("Suit 688") involving DA Land and six others against the plaintiffs and two others, a consent judgment dated 2 June 2016 (based on the settlement agreement H dated 9 May 2015) was entered, whereupon, *inter alia*, the plaintiffs admitted, under para. 3(ii)(a), that the plaintiffs had no right, claim or caveatable interest over Rawang 4.

[16] Unbeknown to the plaintiffs, the defendant entered into a SPA with I DA Land on 24 May 2016, which was backdated to 1 October 2015, for the re-purchase of three lots of Rawang 4, excluding the one with Ho's caveat,

for RM84,000,000 (Rawang 3). The consideration of RM25,500,000 paid under the assignment agreement to the plaintiffs (of which a total sum of RM23,000,000 was paid directly by the plaintiffs to DA Land under the plaintiffs' SPA with DA Land dated 23 June 2015) was declared as the deposit to DA Land. The defendant relies on an undated acknowledgement letter issued by DA Land and signed by the Chew Brothers which states as follows:

> Re: Sale of the following lands
>
> | Geran | Lot |
> |---|---|
> | 124341 | 25032 |
> | 124342 | 25033 |
> | 54446 | 18057 |
> | 62372 | 15751 |
>
> Mukim Rawang
>
> Vendor: DA Land Sdn Bhd
>
> Purchases: Ong Koh Hou @ Won Kok Fong
>
> Price: RM84 Million
>
> This is to acknowledge that Mr. Ong Koh Hou @ Won Kok Fong has on this day paid to Lim Swee Choo and Chiam Eng Huat @ Chiam Eng Hong at our request the sum of Ringgit Twenty Five Million Five Hundred Thousand (RM25,500,000.00) only which is deemed to be and taken by us as part payment towards the purchase by him from us of the above Lands.

[17] By way of a letter dated 28 November 2016, the first plaintiff had, *inter alia*, demanded for the defendant to pay RM2,500,000 due to the alleged defendant's breach of the assignment agreement and the supplemental assignment agreement.

[18] However, a dispute arose between the defendant and DA Land, culminating in DA Land's Suit No. BA-22NCVC-396-07/2017 ("Suit 396") and the defendant's Suit No. BA-22NCVC-88-02/2017 ("Suit 88") which were heard together in the Shah Alam High Court.

[19] On, 2 March 2018, the learned High Court Judge in these suits held, *inter alia*, that DA Land was entitled to terminate the SPA and forfeit the deposit paid of RM23,000,000 as a result of the defendant's failure to pay the balance of the purchase price of RM61,000,000 on or before the completion date, 31 October 2016, and the defendant had also failed to seek an extension of time for the payment. It was also found that the defendant

admitted to not having paid anything to DA Land and that the defendant was an unlicensed moneylender. Accordingly, the court held that the supplementary agreements, which formed part of the SPA, are sham transactions tainted with illegality and, therefore, void.

[20] In relation to the payment of the deposit, the learned High Court Judge ruled that there was no certainty as to the actual amounts that were allegedly paid by the defendant to DA Land under the SPA. In the judgment, reported as *DA Land Sdn Bhd v. Ong Koh Hou & Another Case* [2018] CLJU 205; [2018] 1 LNS 205, the learned High Court Judge made the following observation at paras. 12, 18 and 19:

> [12] ... Testimony Ng Geok Chee (SD1) - Re Examination
>
> S: In 1st Supplementary Agreement page 63 its record that sum of 25.5 million was paid to DA Land. Do you agree?
>
> J: Yes.
>
> S: Did you witness this money go through to your firm accounts?
>
> J: No.
>
> S: According to the agreement Mr Ong has entitled to proceed, to complete the SPA if DA Land does not pay the 61 million, correct? So did he give you instruction to proceed to complete the SPA?
>
> J: No.
>
> S: Did he pay the balance purchase price into your banks account?
>
> J: No.
>
> S: Did you as solicitor asked for an extension of the completion date?
>
> J: No.
>
> From the above testimonies, it is clear to my mind the defendant/purchaser was not ready, able and willing to perform the contract at the time. *His solicitor (SD1) had confirm that the balance of RM23 million was not deposited into her firm's account* and confirms that she received no instructions from the defendant/purchaser to seek an extension or at all and as such she then discharged herself.
>
> [18] ... Testimony Ong Koh Hou (SD2) - Cross-Examination?
>
> S: In this agreement it is stated that you had paid 25.5 million to the plaintiff?
>
> J: Correct.
>
> S: Did you make payment through cheque?
>
> J: Some through contra some I helped them to settle off their debt.
>
> S: So you confirmed no actual money was paid?

J: No.

S: So you agree this contra is in relation to the 5 transaction I just referred to you?

J: Yes.

In the above testimonies, the defendant/purchaser during cross-examination had confirmed that *no payments were actually made and that the payment referred to in the Supplementary Agreements 1 and 2 were in fact set offs of various loans owed to him and others.*

...

[19] *On the face of these 3 documents*, the illusion created is that the SPA was executed on 1 October 2015 and then subsequently *part payment of RM25.5 million was made on 3 November 2015* and another part payment of RM10 million was made on 29 September 2016. *Nevertheless from the defendant/purchaser own witness*, (SD1), Ng Geok Chee during re-examination had confirmed that all the 3 Agreement were executed on the same day and *that as far as she was aware no actual payment was made*. Furthermore, the defendant/purchaser has produced no evidence whatsoever to discharge his burden in rebutting the allegation that no monies were paid to DA Land.

Testimony Ng Geok Chee (SD1) - Re-examination

S: Did you witness the giving of the money by way of cheques?

J: No.

S: Did you witness the giving of money by cash?

J: No.

S: Can I take it that you cannot confirm whether 25.5 million was actually paid?

J: I cannot confirm.

S: Referring to the 2nd supplemental Agreement, was this 10 million paid into your clients account for you to act as stakeholder and release?

J: No.

S: Did you witness the handing of the cheques for 10 million to DA Land?

J: No.

S: Did you witness the handing of cash to DA Land?

J: No.

S: Although you are solicitor in the SPA, you cannot confirm that 10 million payments was actually made?

J: I can't confirm.

(emphasis added)

[21] In relation to the defendant's involvement as an unlicensed moneylender, the learned High Court Judge observed at para. 24 as follows:

> [24] ... From the witnesses testimonies, it is my conclusion that it became clear that the defendant/Purchaser had developed a mechanism of lending money with property held as security against various third parties, including companies of which Derek and Howard were Directors. The defendant/Purchaser had acknowledged that all the transactions took the form of Sale and Purchase Agreement. It also followed that in each instance the Vendor/plaintiff was making payments to the defendant/Purchaser in the form of postdated cheque issued in the defendant's/Purchaser favour. This highly unusual nature of these transactions failed to be explained by the defendant when questions were put to him during cross-examination. There are documents bearing the defendant's signature which clearly state that the transaction listed involve payments of principal sums and their charges of interest. On the issue of post dated cheques, though the defendant submits that since the cheques were dishonoured, there is no evidence of interest being paid or collected and hence not a moneylender, nevertheless to my mind the defendant does not explained in any way the nature and purpose of the payments being made via the post dated cheques. *The cumulative effect of all the above evidences which remains unchallenged, to my mind the defendant/Purchaser is in the business of money lending within the meaning of the Moneylenders Act 1951 cannot be ruled out. That being the case, pursuant to Section 5 of the said Act, the defendant/Purchaser is required to be licensed in order to carry on the business of money lending. No such licence having been tendered in evidence it must be taken that the defendant/Purchaser is an unlicensed moneylender and that the supplementary agreements 1 and 2 are tainted by these illegal activities.*
>
> (emphasis added)

[22] The defendant's appeal to the Court of Appeal against the High Court's decision was dismissed on 21 November 2018 (B-02(NCvC)(W)-487-03/2018) and the defendant's further application for leave to appeal against the Court of Appeal's decision was also dismissed by this court on 22 July 2020 (08(f)-621-12/2018(B)).

[23] On 15 June 2020, the plaintiffs, *inter alia*, sought a declaration that the defendant had breached the assignment agreement dated 20 October 2015 and the supplemental assignment agreement, and pursued the balance payment of RM2,500,000 as special damages against the defendant through Kuala Lumpur High Court Civil Suit No. WA-22NCVC-293-06/2020 ("the main suit" from which the present appeals originate). This amount is due and owing to the plaintiffs after the defendant failed to invest the said amount into Rawang 4. The defendant, on the other hand, counterclaimed the return of RM23,000,000 paid to the plaintiffs.

PLAINTIFFS
DEFENDANT
DA LAND
An Assignment Agreement dated 20.10.2015 was entered into between the Plaintiffs and the Defendant whereby the Rawang 4 lands were assigned for RM15.5 million and the Plaintiffs also assigned to the Defendant their rights, title and interest to the SPA dated 23.6.2015.
A Supplemental Assignment Agreement was entered into by them detailing the manner in which the balance of RM7.5 million is to be treated.
Suit 293 led to the current appeals.
An SPA backdated to 1.10.2015 was executed on 24.5.2016 between the Defendant and DA Land for the re-purchase of Rawang 3 at RM84 million.
Suits 366 and 88 were decided in favour of DA Land. The High Court found that the Defendant was an unlicensed moneylender and had admitted to not having paid any sum to DA Land. The Court held that DA Land was entitled to terminate the SPA and forfeit the deposit of RM23 million.
The Defendant's appeal to the Court of Appeal and leave application to appeal to the Federal Court were dismissed.
The Plaintiffs and DA Land entered into an SPA dated 23.6.2015 for the purchase of Rawang 4 at a price of RM23 million.
Suit 688 was resolved by a consent order dated 2.6.2016.

Diagram 1.0: Overview of the Factual Narrative

23.6.2015
The Plaintiffs entered into an SPA with DA Land for the purchase of the Rawang 4
20.10.2015
The Plaintiffs assigned all their rights and interests in Rawang 4 and to the SPA dated 23.6.2015 to the Defendant by way of the Assignment Agreement
24.5.2016
The Defendant entered into an SPA with DA Land for the re-purchase of Rawang 3 which was backdated to 1.10.2015
2.6.2016
A consent judgment, based on the Settlement Agreement dated 6.5.2016, was entered into resolving the dispute between the Plaintiffs and DA Land in Suit 688
2.3.2018
Judgment was entered in favour of DA Land in Suits 396 and 88 where the High Court found that the Defendant was an unlicensed moneylender and that DA Land was entitled to forfeit the deposit of RM23 million
21.11.2018
The Court of Appeal dismissed the Defendant's appeal against the decision of the learned High Court Judge in Suits 396 and 88
15.6.2020
The Plaintiffs filed Suit 293 asserting their claim against the Defendant and the latter responded with counterclaim
22.7.2020
The Federal Court dismissed the Defendant's application for leave to appeal against the decision of the Court of Appeal dismissing his appeal (the High Court Suits 396 and 88)

Diagram 2.0: Timeline of the Events

Antecedent Proceedings And Judgment Below

[24] On 6 August 2021, the parties framed the agreed issues to be tried and submitted them for judicial determination before the High Court as follows:

(i) whether the SPA dated 23 June 2015 between the plaintiffs and DA Land for the purchase of Rawang 4 is tainted by illegal moneylending transactions, in contravention of the Moneylenders Act 1951, and thereby void, unlawful, and unenforceable;

(ii) whether all agreements between the plaintiffs and the defendant concerning Rawang 4 are tainted by illegal moneylending transactions originating from the SPA dated 23 June 2015, and are consequently void, unlawful, and unenforceable;

(iii) whether the plaintiffs were aware that DA Land had sold one parcel of land from Rawang 4, namely Geran 124342 Lot 25033, Mukim Rawang, District of Gombak, State of Selangor to Ho Fook Cheoy at the time the plaintiffs entered into the assignment agreement dated 20 October 2015 with the defendant;

(iv) whether the plaintiffs had consented to the defendant entering into a new SPA dated 1 October 2015 (which was in fact signed on 24 May 2016) with DA Land;

(v) whether the defendant has breached the letter dated 2 October 2015, the agreement dated 20 October 2015 and the supplemental agreement;

(vi) whether the plaintiffs have suffered losses amounting to RM2,500,000 and are entitled to the reliefs claimed; and

(g) whether the defendant has suffered losses amounting to RM23,000,000 and is entitled to the reliefs claimed.

[25] The nature of the plaintiffs' claim is that the defendant had entered into a SPA dated 1 October 2015 with DA Land, executed on 24 May 2016, to purchase Rawang 3 for RM84,000,000 without the plaintiffs' knowledge in breach of the letter dated 2 October 2015, assignment agreement and the supplemental assignment agreement. As a result of this breach, the plaintiffs' investment of RM2,500,000 in Rawang 4 was diminished causing them to suffer a corresponding loss.

[26] On the other hand, the main plank of the defendant's case is that the plaintiffs had deceived him into entering the assignment agreement dated 20 October 2015. He contended that the plaintiffs had failed to disclose that DA Land had, by a SPA dated 22 July 2014, sold one parcel of Rawang 4 (Lot 25033, Title No. 124342) to Mr Ho Fook Cheoy prior to the assignment agreement. Upon being confronted with this transaction, the plaintiffs had allegedly expressed regret for having concealed the information from the defendant. With the consent of both the plaintiffs and DA Land, and

following the defendant's suspicion that the plaintiffs' SPA with DA Land was a questionable transaction, the defendant was constrained to sever his transaction from that of the plaintiffs and independently entered into an SPA dated 1 October 2015, signed on 24 June 2016, with DA Land for the purchase of Rawang 3.

[27] According to the defendant, the plaintiffs' SPA with DA Land was tainted with illegality as it constituted an illegal moneylending transaction with Rawang 4 used as collateral for an unlawful loan of RM20,000,000 between them. It followed that the plaintiffs had no legal power to assign any right in the plaintiffs' SPA to the defendant from the outset, in view of the plaintiffs' SPA being illegal. The assignment agreement and the supplemental assignment agreement, which were the products of the illegal moneylending transaction, were therefore equally illegal and void.

[28] The trial proceeded on 20 September 2021, 21 September 2021, 23 September 2021 and 24 September 2021. The matter was then adjourned and parties' clarification took place on 20 December 2021 and 15 February 2022. On 18 February 2022, the learned High Court Judge dismissed the plaintiffs' claim and the defendant's counterclaim without any order as to costs. In essence, the main findings of the learned High Court Judge may be summarised as follows:

(i) there was no evidence to support the defendant's allegation that the assignment agreement between the plaintiffs and the defendant was tainted by illegal moneylending transactions between the plaintiffs and DA Land. The burden of proving the allegation lies with the defendant and that the defendant's failure to call the material witnesses (*ie*, Chew Brothers) to testify on the allegation of unlicensed moneylending activities was detrimental to the defendant's case on the point. Accordingly, there is no basis for the court to hold that the assignment agreement is void or unlawful;

(ii) the SPA between the plaintiffs and DA Land contains a provision stating that there is a caveat over one parcel of land from Rawang 4. This indicates that the plaintiffs were aware of the existence of the caveat filed by Mr Ho Fook Cheoy. A perusal of the caveat clearly shows that the caveator had purchased the said land. Therefore, the plaintiffs had knowledge that DA Land had sold the land to the caveator;

(iii) in view of the sale, the assignment agreement could not be completed without amendment. It is, therefore, unreasonable for PW1 (*ie*, the first plaintiff) to maintain that she had no knowledge whatsoever of the new SPA between the defendant and DA Land. The defendant did not breach the assignment agreement or the supplemental assignment agreement. It must be noted that the obligation to remove Ho's caveat rested not with the defendant but with DA Land;

(iv) although the plaintiffs have suffered a loss, the defendant did not breach the assignment agreement or the supplemental agreement. Following the principles in *Berjaya Times Square* and *Damansara Realty* on total failure of consideration, it is unreasonable for the plaintiffs to pursue their claim against the defendant for the sum of RM2,500,000 given that the defendant was no longer able to acquire the entirety of Rawang 4; and

(v) having concluded the SPA for Rawang 3 with DA Land, the defendant did not claim for the return of RM23,000,000 from the plaintiffs on the ground that the assignment agreement was tainted with the alleged illegal moneylending transactions. The defendant had taken no action against the plaintiffs when the agreements involving Rawang 4 and Rawang 3 failed to materialise. It was only when the plaintiffs filed the main suit that the defendant filed his counterclaim for his alleged loss. The defendant's loss was not caused by the plaintiffs but rather by the defendant's own greed.

[29] Aggrieved by the decision of the learned High Court Judge, the plaintiffs and the defendant filed their respective appeal to the Court of Appeal in Civil Appeal No. W-02(NCVC)(W)-439-03/2022 ("Appeal No. 439") and Civil Appeal No. W-02(NCVC)(W)-449-03/2022 ("Appeal No. 449") respectively. On 24 July 2023, the Court of Appeal dismissed the plaintiffs' Appeal 439 with costs and allowed the defendant's Appeal 449 with costs. The main findings of the learned panel of the Court of Appeal may be summarised as follows:

(i) the defendant bears the evidential burden to prove illegality under s. 103 of the Evidence Act 1950 (Act 56). The assignment agreement and the supplemental assignment agreement had not been tainted with the plaintiffs' SPA as no evidence had been adduced at the trial to prove, on a balance of probabilities, that the said SPA had contravened the Moneylenders Act 1951 (Act 400). Even if it is assumed that the said SPA had breached Act 400, no evidence has been adduced to show that its illegality subsequently tainted the assignment agreement and the supplemental assignment agreement. Therefore, there is no room for the defendant to invoke s. 66 of the Contracts Act 1950 (Act 136);

(ii) citing *Berjaya Times Square* and *Damansara Realty*, the Court of Appeal ruled that there was a total failure of consideration as the defendant had paid RM23,000,000 to the plaintiffs and that following Suit 688, the plaintiffs had no right, claim or caveatable interest in Rawang 4 and were not in a position to absolutely assign any right or interest therein to the defendant under the assignment agreement and supplemental assignment agreement. The plaintiffs had actual knowledge of the sale of one parcel of land from Rawang 4 to Mr Ho Fook Cheoy and they have not demonstrated that the High Court's finding of fact regarding their knowledge is plainly wrong;

(iii) in view of the total failure of consideration, the plaintiffs' Appeal No. 439 regarding the amount of RM2,500,000 should be dismissed, not because there was no breach by the defendant but because allowing the plaintiffs to claim the amount from the defendant would be unconscionable and result in their unjust enrichment. The Court of Appeal disagreed with the learned High Court Judge's factual finding that the plaintiffs had suffered a loss as the plaintiffs in the first place could not, in fact, absolutely assign any right or interest in Rawang 4;

(iv) the total failure of consideration also justified allowing the defendant's Appeal No. 449. The Court of Appeal held that the learned High Court Judge should have applied the restitutionary principle and ordered the plaintiffs to return RM23,000,000 to the defendant, irrespective of the defendant's greed or altruism or the defendant's failure to deny the first plaintiff's letter of demand dated 28 November 2016, as the defendant would have otherwise paid the sum in vain resulting in an injustice to the defendant and an unjustifiable windfall to the plaintiffs. Notwithstanding their actual knowledge of the sale to Mr Ho Fook Cheoy, the plaintiffs entered into the assignment agreement and the supplemental assignment agreement with the defendant without disclosing the said sale and received RM3,000,000 from the defendant. By reason of their inequitable conduct, they plaintiffs cannot now rely on the doctrine of equitable estoppel; and

(v) section 71 of the Contracts Act 1950 (Act 136) only applies where there is no contract between the parties. In the present case, the plaintiffs and defendant had concluded the assignment agreement and the supplemental assignment agreement.

[30] Both rulings, read together, support the following conclusions:

(i) it is the concurrent finding of the learned High Court Judge and the learned panel of the Court of Appeal that the plaintiffs' SPA with DA Land dated 23 June 2015 is valid, as are the assignment agreement dated 20 October 2015 and the undated supplemental assignment agreement, both entered into between the plaintiffs and the defendant; and

(ii) both the High Court and the Court of Appeal referred to *Berjaya Times Square* and *Damansara Realty* in support of their findings that there was a total failure of consideration thereby justifying the dismissal of the plaintiffs' claim against the defendant.

Leave Questions

[31] During the application for leave to appeal to this court, the plaintiffs were the applicants and the defendant was the respondent. Their respective capacity was mirrored in the leave question. On 3 July 2024, the plaintiffs were granted leave to appeal to this court on the following questions of law:

(i) question 1: whether the doctrine of a total failure of consideration, as an equitable doctrine, could be invoked by the respondent to recover from the applicants a sum of RM23,000,000 which sum had previously been declared by the High Court in a related suit (affirmed on appeal) as non-recoverable because it comprised part of an illegal moneylending transaction engaged in by the respondent and in which proceedings the respondent was declared as an unlicensed moneylender;

(ii) question 2: whether the doctrine of a total failure of consideration, as an equitable doctrine, could be invoked by the respondent to recover a sum of RM23,000,000 from the applicants when the respondent was held by the High Court in the present case as the party who had caused the loss and on which "loss" he had based his claim of a total failure of consideration;

(iii) question 3: whether the doctrine of a total failure of consideration could apply where there has been performance or part-performance of the contract, which in this case was the assignment of a sale agreement by the applicants to the respondent, pursuant to which the respondent made part-payment thereof and received the benefit of the assignment;

(iv) question 4: whether the true test of a total failure of consideration is as stated by the House of Lords in *Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 WLR 574 per Lord Goff of "whether the promisor has performed any part of the contractual duties in respect of which payment is due" (p. 588) and not the test of "whether the party in default has failed to perform his promise in its entirety" as stipulated by the Federal Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 at 609;

(v) question 5: whether the case of *Berjaya Times Square (supra)* relied on by the Court of Appeal has wrongfully conflated the right of rescission of a contract with the right to seek restitution of monies paid and received (which is independent of rescission or termination of a contract) and is therefore not truly classifiable as an authority for the doctrine of restitution based on a total failure of consideration; and

(vi) question 6: whether on its true principle the doctrine of a total failure of consideration has no application where there has been only a partial failure of performance or the claimant has derived some benefit from the contract so that he is restricted to an action in damages for breach of contract as opposed to restitution per *Phang Quee v. Virutthasalam & Ors* [1965] CLJU 131; [1965] 1 LNS 131; [1965] 2 MLJ 166; *Baltic Shipping Co v. Dillon* [1993] 111 ALR 289.

For the purposes of the present appeals, references to the parties in these questions will be modified to reflect their respective capacities as they appeared in the proceedings before the High Court.

Our Analysis And Decision

Academic Literature In Judicial Reasoning

[32] The judicial decision-making process entails a critical engagement with live and intelligent legal controversy presented in the courtroom. This process, within which the systematic analysis of fact and law is integral to judicial reasoning, constitutes a discipline in its own right. The integrity of this discipline is preserved when judges remain meticulous in their strict adherence to established methodological approaches in interpreting and applying the law even if their findings and decisions are later reversed on appeal or review. Quoting Lord Reid, Lord Mance in His Lordship's speech titled "The Role of Judges in a Representative Democracy" during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas on 24 February 2017 reiterated:

> *[Judges] will consider the implications of [a] decision, and will ensure that it is consistent with the general purpose and scheme of the law or principle ... Judging is thus not a science, but a discipline. The good judge is loyal to well established approaches and methods of reasoning.* But she or he may in the last analysis have to exercise an important judgment as to the relevant weight of different and sometimes competing considerations, in deciding in which sense to state or restate the legal position.
>
> (emphasis added)

[33] Within the constraints of our duty to method of reasoning, coherence, rationality and fidelity to legal principles and rules, it must be acknowledged that the scholarly contributions of passionate legal academics, serving judges writing in an extra-judicial capacity, legal practitioners and even retired judges are indispensable to lucid judicial reasoning. In the present appeal, for instance, learned counsel for the plaintiffs referred us to the following academic commentaries on *Berjaya Times Square* and *Damansara Realty* to which we shall turn at great length in the ensuing part of this judgment:

(i) Visu Sinnadurai (2023), *Law of Contract* (5th edn), LexisNexis, vol. 2, at pp. 1161 to 1165;

(ii) David Fung Yin Kee (2019), *Berjaya Times Square Revisited: What's in a Name?*, Journal of the Malaysian Judiciary at pp. 169 to 203;

(iii) Low Weng Tchung (2015), *The Law of Restitution and Unjust Enrichment in Malaysia*, LexisNexis at pp. 61, 430, 465 to 468; and

(iv) Visu Sinnadurai (2011), *Law of Contract* (4th edn), LexisNexis at pp. 1031 to 1042.

[34] Additionally, by judicial notice, we also extended our reference to the following works which reflect a similar academic perspective:

(i) Cheong May Fong & Lee Yin Harn (2016), *Civil Remedies* (2nd edn), Sweet & Maxwell at pp. 36 to 39; and

(ii) J W Carter (2011), *Fundamental Breach and Discharge for Breach under the Contracts Act 1950 (Malaysia)*, Journal of Contract Law, vol. 28, 85 to 100.

For reasons that will become apparent, these academic works highlight several critical points which, in our considered view, the learned panels in *Berjaya Times Square* and *Damansara Realty* might have found beneficial had these points been brought to their attention at the time of deciding those appeals. It would be remiss of us to disregard these points now that the opportunity to consider them is before us.

[35] Given the far-reaching effect of appellate judicial rulings as precedents, judicial reasoning that detaches or that fails to engage with, in appropriate instances, informed critique duly submitted by the parties not only weakens the resulting judgment but also undermines its persuasive legitimacy. Respectful and fair criticism of judicial precedents objectively presented in published academic commentaries not only signifies judicial transparency and a commitment to fostering legal literacy and discourse but also plays a vital role in refining our home-grown jurisprudence and promoting the continual development of, in the context of the present appeal, a corpus of contract law.

[36] In the discharge of our judicial role, we must refrain from interpreting laws according to our own standards or ideas of reason and justice. What matters is not what we believe to be right but rather what we may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right. The standard is, therefore, an objective one.

[37] As we have seen within the common law tradition, Lord Mance of Frognal, in His Lordship's extra-judicial speech titled "The Changing Role of an Independent Judiciary", delivered during the 23rd Sultan Azlan Shah Law Lecture on 15 December 2009 and published in *Sultan Azlan Shah Law Lectures II - Rule of Law, Written Constitutions & The Common Law Tradition*, (2011), Sweet & Maxwell, acknowledged the following at p. 387:

> In contrast, common law judges have carefully to place each decision in the context of prior case law and the submissions before him. In this way, the common law judge aims to legitimise his or her decisions and to ensure their social acceptability. **The common law's traditional invocation of the reasonable person fits into the same pattern. The common law judge is appealing to the ordinary member of the public**.
>
> (emphasis added)

Therefore, we find it imperative to act on learned counsel for the plaintiffs' invitation to consider these academic works which, in our considered view, are beneficial in enabling an objective examination of the precedents under review closer to the above ideal. Ultimately, however, the duty for deciding these appeals rests with us.

[38] Some academic works are directed at judges, suggesting perspectives on how our courts should decide cases coming before us. Observing how legal academics have engaged with novel or contentious legal issues, whether in the abstract or in response to decided cases, may better equip us to address such matters in the course of judicial determination. In this context, the relationship between our courts and our legal scholars is dialogic. For instance, Visu Sinnadurai (2011), in his work, stated at p. 1042 as follows:

> In conclusion it is submitted that the doctrine of total failure of consideration generally has no place in the area of breach of contract. It has limited application only in cases where the action is based on restitutionary relief, *ie,* where an innocent party seeks recovery of monies paid and not in for a claim in damages for breach. In all other cases of breach, the traditional test as employed by Malaysian and English cases, *ie,* fundamental breach, or the like, is the correct approach. Total failure of consideration certainly has no place in cases dealing with time such as in Berjaya Times Square. *It is hoped that the opportunity will soon arise for the Federal Court to revisit its decision in Berjaya Times Square and restate the correct position of the law. Uncertainties in the law cause discomfort to businessmen and lawyers alike.*
>
> (emphasis added)

[39] It goes without saying that academic commentaries cannot trump primary sources of law. However, the value of the lifelong academic contributions of legal experts in the field particularly those whose scholarship has shaped comparative and fundamental theoretical understanding form a body of work that courts would do well to consider in the pursuit of responsible judicial reasoning. Equally important are the academic insights of derivative contributors which also carry force in the dynamic progression of legal thought. In essence, no principled approach to judicial adjudication can disregard the contributions of academic literature.

[40] That being said, we did not, however, regard our approach to the above matter as an innovation. In fact, Lord Denning MR in *White v. Blackmore* [1972] 3 All ER 158 expressed disappointment with counsel for failing to cite relevant academic literature in their submissions when stating at p. 167 as follows:

> *Ashdown v. Williams has been vigorously criticised by Professor Gower in the Modern Law Review*. He pointed out the consequences of it, if carried to its full length. He gave good reasons for thinking that a licensor could not exempt himself from liability to his licensee except by contract. *Unfortunately, his criticisms were not brought to our attention. I am disposed to agree with them.*
>
> (emphasis added)

[41] Illustrative of the essence of our point, Steyn LJ delivering the supporting judgment of the English Court of Appeal in *White v. Jones* [1993] 3 All ER 481 made the following extensive observation at p. 500:

It is therefore not altogether surprising that the appeal in the present case lasted three days, and that we were referred to about forty decisions of English and foreign courts. Pages and pages were read from some of the judgments. But we were not referred to a single piece of academic writing on Ross v. Caunters. Counsel are not to blame: traditionally counsel make very little use of academic materials other than standard textbooks. *In a difficult case it is helpful to consider academic comment on the point. Often such writings examine the history of the problem, the framework into which a decision must fit and countervailing policy considerations in greater depth than is usually possible in judgments prepared by judges who are faced with a remorseless treadmill of cases that cannot wait. And it is arguments that influence decisions rather than the reading of pages upon pages from judgments*. I am not suggesting that to the already extremely lengthy appellate process there should be added the reading of lengthy passages from textbooks and articles. *But such material, properly used, can sometimes help to give one a better insight into the substantive arguments. I acknowledge that in preparing this short judgment the arguments for and against the ruling in Ross v. Caunters were clarified for me by academic writings.*

(emphasis added)

[42] In the context of contract law which is directly relevant to the present appeal, Lord Browne-Wilkinson in his speech in the House of Lords in *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd* [1994] AC 85 stated the following at p. 112:

There is therefore much to be said for drawing a distinction between cases where the ownership of goods or property is relevant to prove that the plaintiff has suffered loss through the breach of a contract other than a contract to supply those goods or property and the measure of damages in a supply contract where the contractual obligation itself requires the provision of those goods or services. *I am reluctant to express a concluded view on this point since it may have profound effects on commercial contracts which effects were not fully explored in argument. In my view the point merits exposure to academic consideration before it is decided by this House*.

(emphasis added)

[43] However, we are mindful of the danger of citing academic literature that merely expresses opinions or preferences unsupported by legal analysis as it provides little assistance and does not advance our reasoning. According to weight to such writings solely because they are academic in origin is a misconceived approach. Lord Goff in *Hunter v. Canary Wharf Ltd* [1997] 2 WLR 684 at p. 694 articulated:

I would not wish it to be thought that I myself have not consulted the relevant academic writings. I have, of course, done so as is my usual practice; and it is my practice to refer to those which I have found to be of assistance, but not to refer, critically or otherwise, to those which are not. In the present circumstances, however, I feel driven to say that *I found in the academic works which I consulted little more than an assertion of the desirability of extending the right of recovery in the manner favoured by the Court of Appeal in the present case. I have to say (though I say it in no spirit of criticism, because I know full well the limits within which writers of textbooks on major subjects must work) that I have found*

no analysis of the problem; and in circumstances such as this, a crumb of analysis is worth a loaf of opinion. Some writers have uncritically commended the decision of the Court of Appeal in *Khorasandjian v. Bush* [1993] QB 727, without reference to the misunderstanding in *Motherwell v. Motherwell*, 73 D.L.R. (3d) 62, on which the Court of Appeal relied, or consideration of the undesirability of making a fundamental change to the tort of private nuisance to provide a partial remedy in cases of individual harassment. *For these and other reasons, I did not, with all respect, find the stream of academic authority referred to by my noble and learned friend to be of assistance in the present case*.

(emphasis added)

Certainty In Judicial Interpretation And The Rule Of Law

[44] Central to the above understanding is consideration of legal certainty and predictability, traceable to relevant interpretation methods used by judges to reach a proper conclusion in judicial adjudication, as important components of the rule of law. Certainty and predictability in judicial decisions presuppose that legal principles and rules must not only be clear but also interpreted and applied faithfully and correctly by the courts.

[45] Legal methods then serve to ensure rational reasoning and, even in cases involving novel legal issues, enable the court to adopt a variety of rationally predictable methods in judicial decision-making thereby promoting legal certainty on the broadest possible scale. By positioning the rule of law as the ultimate objective, achievable through legal certainty which in turn is underpinned by legal methods, the scope for judicial discretion may be preserved without allowing it to devolve into arbitrariness. In relation to the present appeals before us, we find it imperative to revisit two important legal methods: (i) statutory interpretation and (ii) judicial precedent.

[46] As the commonly used legal method in judicial adjudication where legal principles are applied to facts guided by judicial syllogisms, legal certainty requires court to interpret statutory provisions based on certain predetermined approaches of statutory interpretation (some referred them as theories or arguments) and their priority which can be categorised as follows:

(i) the textual interpretation requires the court to give due regard to the plain and ordinary meaning of the words used in the statutory provision under review (*Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721; *United Hokkien Cemetries, Penang v. The Board, Majlis Perbandaran Pulau Pinang* [1979] CLJU 122; [1979] 1 LNS 122; [1979] 2 MLJ 121; *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35). Only if the natural construction of the words fails to answer the question before the court is the court then compelled to look beyond the strict letter of the legislation to discern its purpose. By focusing on the

objective meaning of the text independent of any ideological or political-moral context, this approach limits judicial discretion in the interpretative process thereby promoting a very high degree of certainty and predictability in judicial outcomes;

(ii) the intentionalist approach to statutory interpretation requires the court to give due regard to, without doing actual violence to the clear meaning of any of the words used, the underlying intention of Parliament and to interpret the words used in the manner Parliament intended them to be understood (*Ng Hoe Keong & Ors v. OAG Engineering Sdn Bhd & Ors* [2022] 5 CLJ 321; [2022] 3 MLJ 641; *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277; *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285; [1994] 3 MLJ 345; *Marley v. Rawlings* [2012] EWCA Civ 61; *Beswick v. Beswick* [1968] AC 58; *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591). Since all statutes are the product of deliberate legislative action, each represents the collective will of the society as expressed through its democratically elected representatives. Legal certainty is upheld when the court interprets a provision in accordance with its legislative purpose, relying on sources such as Hansard and historical materials which are publicly accessible thereby honouring the democratic legitimacy and justification of the provision rather than substituting the judge's personal will;

(iii) the systematic approach to interpretation (within which harmonious interpretation forms a core aspect and may be supplemented by comparative analysis) requires the court to construe the words used in a particular provision in a manner most compatible with the other components of the same statute and the wider legal system (*Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2020] 1 CLJ 1; [2020] 1 MLJ 141; *Mahiaddin Md Yasin v. PP* [2024] 10 CLJ 924; [2024] MLJU 2291). This approach promotes consistency and coherence throughout the legal system thereby ensuring legal certainty and predictability. Therefore, alternative interpretations that conflict with legal principles or result in logical inconsistencies are unsustainable; and

(iv) lastly, teleological interpretation requires the court to adopt a reading that gives effect to the underlying goals of the provision under review by referring to its broad purposes or foundational values (*Asian International Arbitration Centre v. One Amerin Residence Sdn Bhd & Ors And Another Appeal* [2025] 3 CLJ 633; [2025] 2 MLJ 634; *R (on the application of Quintavalle) v. Secretary of State for Health* [2003] 2 All ER 113; *James Buchanan & Co Ltd v. Babco Forwarding and Shipping (UK) Ltd* [1977] 1 All ER 518). Commonly referred to as purposive interpretation, this approach is more expansive than the intentionalist

A approach, as it goes beyond identifying the specific intent of Parliament and instead focuses on the broader objectives, logical theory and rationale of the law. However, this approach cannot be viewed in isolation as a mere pursuit of subjective ideals at the fancy of the court or solely as a form of consequentialism. Rather, it must be grounded in
B other established factors within the legal system. The more adequately these supporting factors (including natural justice, human rights, policy considerations, empirical consequences and practical viability to substantiate the meaning of the words used) are addressed, the more robust the reasoning becomes. This is because the interpretative exercise
C does not only consider the goal of the single provision but also the optimal functioning of the legal system as a whole which implies a certain predictability and certainty in judicial outcomes.

[47] Where multiple approaches are applicable, how should the courts determine which approach to adopt? It may well be argued that the
D aforementioned approaches are independent and that no definitive hierarchy can be established as each approach reflects a distinct underlying value and their relative importance is perceived differently by different individuals. While these separate approaches may complement one another in ideal circumstances, such harmony is not always achievable in practice, given the
E divergence in reasoning behind interpretative perspectives, the context of the case and judicial decisions. Therefore, some form of sequential primacy is necessary to ensure legal certainty.

[48] Unless compelling reasons justify a departure, these approaches may be ranked in the conventional order; in our considered view, the spectrum
F from textual, intentionalist and systematic to teleological approaches reveals a demonstrable weakening of legal certainty corresponding with an increasing tendency towards judicial discretion in statutory interpretation. Quite recently, Lord Sales, in his address titled "Statutory Interpretation in Theory and Practice", delivered to the office of Parliamentary Counsel on
G 20 March 2025, articulated the following at p. 16:

> **Citizens subject to the law expect the legislator to legislate for a coherent, not an arbitrary regime. So they expect the courts to interpret statutes to produce coherent results**.
>
> (emphasis added)

H **[49]** As rudimentary as the above discussion may appear, we will see that what may be regarded as a judicial development in *Berjaya Times Square* reveals how this court interpreted s. 40 of the Contracts Act 1950 (Act 136) within the framework of the law of restitution through a curious exercise that departs from conventional reasoning approach which typically derives
I conclusions through step-by-step formal methodology and doctrinal justification as illustrated above even though, on its fact, the decision in

Berjaya Times Square was correctly made. With all due respect, in our considered view, methodological randomness will undermine legal certainty and the basis of rule of law. We will then see how *Berjaya Times Square* fared in relation to the academic literature cited by learned counsel for the plaintiffs.

[50] This, however, does not mean that courts cannot develop legal solutions through judicial creativity. As we alluded to above, what matters is not what we believe to be right but rather what we may reasonably believe another person of normal intellect and conscience might reasonably regard as right. This speaks volumes about the tension between authoritative reasoning (which relies on legal authorities) and substantive reasoning (which incorporates fairness, public interest, economic and moral considerations) in the judicial decision-making process. The former produces decisions in accordance with the law while the latter seeks justice in individual cases (provided that substantive reasoning remains within the framework of recognised sources of law). When both are harmonised, the resulting decisions are legally sound and reasonable.

[51] However, when the goals of the two approaches conflict, the outcome may be either legal but unreasonable or reasonable but not in accordance with the law. In the larger scheme of things, this reflects the struggle between legal certainty (decisions made according to established law) and what is regarded as "correct" (*ie*, reasonable). In the context of judicial development in the pursuit of justice in individual cases, considerations of correctness often take precedence over certainty. But should justice in an individual case always prevail over adjudication in accordance with the law? Cumming-Bruce LJ in *Davis v. Johnson* [1978] 2 WLR 182 observed at p. 880 as follows:

> In 1969 a difference of opinion emerged between Lord Denning MR and Russell and Salmon LJJ: see *Gallie v. Leey*; and this difference with the majority has persisted in a number of differently constituted courts, for example, *Tiverton Estates Ltd v. Wearwell* and *Farrell v. Alexander*. In the nature of things the House of Lords can never decide the question as necessary to their *ratio decidendi*, but the observations on the doctrine of precedent made in the House of Lords indicate that the present practice of the Court of Appeal commands the emphatic approval of the final appellate tribunal: see *Cassell & Co Ltd v. Broome* and *Farrell v. Alexander*. Scrutiny of these cases and respectful consideration of the dissenting views expressed by Lord Denning MR in this court lead me to the conclusion that the practice is based on an appreciation of the policy which is most likely to afford the Crown and its subjects *a judicial system in which the conflicting claims of certainty and justice in individual cases are reconciled. It seems to me that in any system of law the undoubted public advantages of certainty in civil proceedings must be purchased at the price of the risk of injustice in difficult individual situations.*
>
> (emphasis added)

[52] Through this analysis, we wish to highlight that a judicial exercise which prioritises correctness over legal certainty neither reflects the true nature of judicial adjudication nor fosters a healthy relationship between the Legislature and the Judiciary. What judicial adjudication should instead strive for is a balance between correctness and legal certainty even in the course of judicial development. In our considered view, judicial development is justified when the demand for justice in an individual case is so compelling that, even after a careful balancing exercise, it outweighs the damage to legal certainty. After all, judicial decision-making is guided by a search for the correct balance of all relevant factors.

[53] As we shall endeavour to show later, a more nuanced consideration of legal certainty does not appear to have featured prominently in the analysis of s. 40 of the Contracts Act 1950 (Act 136) made within the framework of the law of restitution in *Berjaya Times Square*. What *Berjaya Times Square* introduced did not sit comfortably with previous local authorities (including *Lim Ah Moi v. AMS Periasamy Suppiah Pillay* [1997] 3 CLJ 629; [1997] 3 MLJ 323; *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434; [2007] 4 MLJ 1; *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2005] 2 CLJ 914; [2009] 3 MLJ 349) and common law authorities (*Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 WLR 574; *Johnson & Anor v. Agnew* [1980] AC 367; *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 All ER 556; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32).

[54] In a system governed by *stare decisis*, where justification is bound by past rulings, legal certainty is preserved when this court dispense justice progressively through gradual refinement of legal principles. Each decision is carefully situated within the context of previously decided cases and judicial opinions that overrule established precedents remain rare. Therefore, unless compelling reasons justify a departure, this court has almost always adhered to its previous rulings and this holds true in *Damansara Realty* where this court sought to justify its reasoning along the position taken in *Berjaya Times Square*.

[55] On this point, Lord Reid, writing extra-judicially in *The Judge as Lawmaker*, published in 1972 in the Journal of the Society of Public Teachers of Law (vol. 12) at p. 23 observed as follows:

> **And there is another sphere where we have got to be very careful. People rely on the certainty of the law in settling their affairs, in particular in making contracts or settlements**. It would be very wrong if Judges were to disregard or innovate on what can fairly be regarded as settled law in matters of this kind.
>
> (emphasis added)

[56] In the same vein, Azahar Mohamed CJM in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 3 CLJ 153; [2020] 2 MLJ 1 propounded at p. 195 (CLJ); p. 14 MLJ (as follows: A

> [79] ... *Any decision of the Federal Court must be treated with utmost deference. More significantly, in my opinion, it is not a good policy for us at the highest court of the land to leave the law in a state of uncertainty bv departing from our recent decisions. That will put us in a bad light as the Federal Court will then purports to be in a state of quandary when deciding a case.* It is also a bad policy for us to keep the law in such a state of uncertainty particularly upon a question of interpretation of a statutory provision that comes up regularly for consideration before the courts. B
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> (emphasis added) C

[57] Again, Azahar Mohamed CJM in *Tenaga Nasional Bhd v. Chew Thai Kay & Anor* [2022] 2 CLJ 333; [2022] 2 MLJ 25 articulated the following at p. 355 (CLJ); pp. 42 to 43 (MLJ):

> While it is true that we can overturn our own precedent in exceptional cases where it is really necessary, as an apex court, we need to be cautious about departing from our own earlier decision especially in a case that concerns the interpretation of a legislative provision, lest we lose the trust of public by persistent shifts of laws. *The law is about stability, predictability and certainty that allow the public and the business community to plan and organize their lives based on the previous precedent. A degree of certainty, consistency and predictability in the law is one of the foundations upon which our justice system operates. Therefore, we remind ourselves that it is of utmost importance this court adheres to its past rulings.* D E
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> (emphasis added)

[58] With the foundation laid, we now turn to the crux of the matter. F

Conflation of Principles: Berjaya Times Square And Damansara Realty

[59] *Berjaya Times Square* and *Damansara Realty* were referred to and formed an important part of the basis upon which the learned High Court Judge and the learned panel of the Court of Appeal grounded Their Lordships' decisions. As *Berjaya Times Square* and *Damansara Realty* are rulings of this court, they are binding upon both courts. Academic critiques of this court's ruling in *Berjaya Times Square* are multifaceted and levelled at various aspects of the legal analysis including the treatment of breach or repudiation, rescission, unjust enrichment, restitution and the conflation of breach or repudiation with restitution. While the discussion on these principles in the judgment is interlinked, for the purpose of the present appeals, we are primarily concerned and were implored by learned counsel for the plaintiffs to focus on (i) restitution and (ii) the conflation issue. The other aspects of the critiques, which are not directly relevant to the facts, the parties' submissions and the rulings of the courts below are immaterial and should be reserved for another time. G H I

[60] The discussion on the true scope of the restitutionary doctrine of total failure of consideration is relevant to determining the extent of its application, as an equitable doctrine, in circumstances where issues of illegality (question 1) and unconscionability (question 2) arise, and whether a partial failure of consideration is recognised under the restitutionary principle (question 3) for the purpose of recovery (question 6).

[61] The analysis on the conflation issue is relevant in determining the true test for total failure of consideration in this country (question 4) and in evaluating whether *Berjaya Times Square* is good law from which that test was applied by the courts below (question 5). Accordingly, the context in which the conflation arises must be addressed.

[62] The facts of *Berjaya Times Square* are not directly relevant to the present appeals but the judgment of the case is best appreciated in light of its factual background. Shorn of tautology and concisely put, the case concerns a dispute between a property developer, Berjaya Times Square Sdn Bhd (the appellant), which developed a project marketed as Berjaya Times Square for public sale, and a purchaser of a commercial shop lot within the project (the respondent). Under the terms of the SPA dated 24 August 1995, time was of the essence. The appellant was required to deliver the lot by 23 November 1998, failing which liquidated damages would accrue daily at a rate of 12% per annum of the purchase price. Although the project was completed, the appellant failed to deliver the unit within the stipulated time. Following a series of meetings, correspondence and several unfulfilled revised delivery dates, the respondent commenced proceedings seeking a declaration that the agreement had been terminated, a refund of all sums paid and damages. The appellant resisted the claim, contending that it was only liable to pay liquidated damages calculated in accordance with the agreed formula.

[63] In so far as they are relevant in the context of the present appeals, this court in *Berjaya Times Square* applied s. 40 of the Contracts Act 1950 (Act 136) read together with s. 56(1) of the same in deciding that the respondent did not have the common law right to rescind the contract since, on the facts, the learned panel found that there was no total failure of consideration. The common law right to rescind was introduced by this court in *Berjaya Times Square* through a conflation of, the right to restitution of the benefit for a consideration which had failed which was derived from *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, with Diplock LJ's approach to fundamental breach in *Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. Through this approach, this court in *Berjaya Times Square* read the words "any such thing" from the phrase "fails to do any such thing" in s. 56(1) as referring to the "promise in its entirety" in s. 40 which, in turn, was interpreted to mean that the

appellant's performance must have been a total failure of consideration; a concept under the law of restitution. The test for total failure of consideration, as applied by this court in *Berjaya Times Square* is whether the party in default has failed to perform his promise in its entirety.

[64] For ease of reference, the relevant portions of the judgment corresponding to the above summation are reproduced as follows:

> [4] As regards the law on rescission of contract which is the main issue to be decided in the present case, I am of the view on the factual matrix of the case that s. 56(1) should be read together with s. 40 of the Act in determining the question as to whether the appellant as the party that was obliged to perform its promise had refused to perform its promise in its entirety by not doing any of the things it promised to do within the time specified by the contract. *A reference to ss. 40 and 56(1) of the Act clearly showed that the right to rescind a contract by way of termination only arises when there has been a total failure of consideration*. What is of significance on the facts of this case is that there is no question of the appellant not having done anything on the construction of the property as undertaken by them *vide* the SPA. Indeed the facts before the court showed that the construction of the property was completed and was in the state of delivery to the respondent. It is my view that the entitlement of the respondent in this case is confined and limited to compensation in the form of LAD as agreed upon in the SPA and that the respondent has no right to rescind the SPA.
>
> ...
>
> [12] The starting point is to recognise that in an action for breach of contract it is the court that determines who is the innocent party and who is the guilty party. That problem does not arise in the present case because the appellant has freely admitted throughout the proceedings that it is the party that is guilty of having breached the contract. *The only issue that remains is whether – as held by the learned trial judge – the respondent as the innocent party is entitled to rescind the contract, that is to say, to have the parties restored to a position where they will stand as if the contract had never been made*.
>
> ...
>
> [16] The hallmark of the equitable remedy of rescission is that it is only available to set aside contracts that are voidable by reason of the ingredient of free consent, which is the *sine qua non* in the making of a contract, having been vitiated by an element external to the contract. Examples of elements that vitiate free consent are fraud, misrepresentation, duress, undue influence and a breach of fiduciary duty. Whether a court of equity will set aside a contract that is void for common mistake (which is an element that does not vitiate free consent) is one that is debatable after the decision of the English court of Appeal in *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] QB 679; [2002] 4 All ER 689 which sought to overrule Denning LJ's view in *Solle v. Butcher* [1949] 2 All ER 1107; [1950] 1 KB 671. Speaking for myself, I am not prepared to say, in the absence of full argument on the point,

A that Denning LJ was wrong in *Solle v. Butcher* and that the Court of Appeal in *Great Peace Shipping* is correct. Be that as it may, the position in equity is that rescission is not a remedy available for the breach of a contract. In short, equity does not restore the parties to a broken contract to their *status quo ante*.

B [17] That said, it is now settled that there is, at common law, a right to rescind a contract in very limited circumstances. In essence it is the *quasi*-contractual remedy of restitution in cases where there has been a total failure of consideration. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at p 48, Viscount Simon LC said:

> C ... in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the *quasi*-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure
> D performance and, if performance fails the inducement which brought about the payment is not fulfilled.
>
> If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples
> E which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled ...

[18] What has to be added to the learned Lord Chancellor view is the qualification:

> F ... that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract ... but rather *whether the promisor has performed any part of the contractual duties in respect of which the payment is due (Stocznia Gdanska SA v. Latvian Shipping Co & Ors [1998] 1 All ER 883 per Lord Goff of Chieveley).*

G In other words, when deciding whether there is in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. *The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety*. The facts of *Stocznia Gdanska SA v. Latvian*
H *Shipping Co & Ors* [1998] 1 All ER 883 illustrate the proposition.

...

[20] Absent a total failure of consideration, the common law right to rescind does not exist. *Goff & Jones The Law of Restitution* (6th Ed) which
I is the leading text on the subject has this to say at p 502, para 20-007:

> A breach of contract may be so fundamental that it deprives the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as

> expressed in the contract that he should obtain as the consideration for performing those undertakings (*Hong Kong Fir Shipping Co Ltd v. Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26). The innocent party has then an election. He may affirm the contract or he may bring it to an end. In the latter event, if he has paid money to the defendant under the contract, he can, as an alternative to claiming damages, sue for recovery of the money provided that the consideration for the payment has wholly failed; if the consideration has partially failed, his only action is for damages.

In other words, where there has been a total failure of consideration, the innocent party has the alternative remedy of suing to recover monies paid under the contract to the guilty party. But he can under no circumstances have his money returned and claim damages. And if the consideration has only partially failed, he may only claim damages. What is important is that this limited common law right to rescind should never be equated with the equitable remedy of rescission earlier discussed. I may add for completeness that in this country the equitable remedy of rescission has received statutory force. See ss. 34-37 of the Specific Relief Act 1950.

[21] There are two leading English cases that make the position clear. The first is *Johnson & Anor v. Agnew* [1980] AC 367 at p 392 where Lord Wilberforce said:

...

[22] The other is *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 All ER 556, where Lord Wilberforce repeated what he had said in *Johnson & Anor v. Agnew*:

...

[24] *It is my considered judgment that the position is no different in Malaysia. Section 40 of the Act is a restatement of the English common law position*. It provides as follows:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Special attention should be paid to the phrase 'his promise in its entirety'. *Under the section the right in a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract*.

[25] That brings me to s. 56(1) of the Act which provides:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

A [26] Learned counsel for the respondent submitted that since the subsection employs the phrase 'voidable at the option of the promisee', it differs from the English common law. With respect that submission is without merit. In the first place, it was held by the Privy Council in *Jamshed v. Burjorji* AIR 1915 PC 83 that the section merely restates the common law on the subject...

B

[27] In the second place, particular attention must be paid to the wording of the subsection. *It says 'fails to do any such thing' within the stipulated time. The words 'any such thing' refer to the promise in its entirety. In my judgment, s. 56(1) should be read together with s. 40 of the Act* when determining whether a promisor has committed a breach of such a nature that goes to the root
C of the contract. This is sometimes described as a fundamental breach. In the third place, s. 56(1) as is the case with the other provisions of the Act are *ipsissimis verbis* the corresponding provisions of the Indian Contract Act 1872. That Act was drafted at a time in the history of the English common law when decided cases, spoke of the voidability of broken contracts and a right to rescind such contracts. This is what Lord Wilberforce in *Johnson*
D *& Anor v. Agnew* referred to as 'the contrary indications' that 'may be disinterred from old authorities'. In my judgment, the phrase 'becomes voidable at the option of the promisee' in s. 56(1) means this: a party not in default has a choice whether to put an end to the contract or signify his or her acquiescence in its continuance when the party in default commits a fundamental breach of contract by not performing his entire
E promise within the time stipulated by the contract, provided that time is of the essence of the contract.

...

[33] ... The present case is distinguishable. *The appellant did construct the*
F *tower block in which the respondent's unit was located. But it did not complete the construction within the specified time. It delayed the actual delivery*.

...

[35] ... But in the present case the facts are very different. *Here, the construction had commenced and was well on its way*. There was a delay in the
G delivery of vacant possession and for that breach the contract itself provides a remedy – the payment of liquidated damages calculated on the agreed formula. *Put simply, this is not a case where there has been a total failure of consideration*.

(emphasis added)

H **[65]** Which aspects of the reasoning in *Berjaya Times Square* might benefit from further clarification? We wish there is a straightforward way of doing this.

[66] This court in *Berjaya Times Square* conflated the right to terminate a contract for breach with the right to claim restitution, recasting both as a
I common law right to rescind, in order to justify reading the concept of total failure of consideration into the phrase "his promise in its entirety" in s. 40.

This can be seen in paras. 12 to 24 of the judgment. However, in our perusal, the respondent in *Berjaya Times Square* did not ground his claim on the basis of restitution but rather on termination of the contract for late delivery and for an order to recover the purchase price paid.

[67] Further, as we have seen in our jurisdiction, the legal proposition of a common law right of rescission when there is a total failure of consideration was considered in *Lim Ah Moi v. AMS Periasamy Suppiah Pillay* [1997] 3 CLJ 629; [1997] 3 MLJ 323 and approved in *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2005] 2 CLJ 914; [2009] 3 MLJ 349 and subsequently clarified in *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434; [2007] 4 MLJ 1 where the Court of Appeal observed at p. 5 that the common law right of rescission is a *quasi*-contractual remedy of restitution:

> *No doubt, there is a very limited right of rescission at common law (Lim Ah Moi v. AMS Periasamy Suppiah Pillay [1997] 3 MLJ 323) which, on closer examination is actually the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration*. See, *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.
>
> (emphasis added)

If the common law right of rescission is truly a *quasi*-contractual remedy of restitution, as mentioned in *LSSC Development Sdn Bhd*, then we think further clarification is needed why such a right was later recognised in *Berjaya Times Square* not only as a *quasi*-contractual remedy but also as a contractual principle for breach of contract. In this regard, *Berjaya Times Square* has departed from earlier authorities and no reference was made to the position in *LSSC Development Sdn Bhd* or the other two cases.

[68] Other local authorities that appear to have laid some foundation for *Berjaya Times Square* are *Tan Ah Tong v. Che Pee Saad & Anor And Other Cases (Consolidated)* [2010] 6 CLJ 560, and the minority view in *Araprop Development Sdn Bhd v. Leong Chee Kong & Anor* [2008] 1 CLJ 135 which applied the concept of total failure of consideration to consider whether there was a right to "rescind" a contract by way of termination. Although they are not in any way binding on this court, viewed as part of a coherent judicial development, the opportunity was present in *Berjaya Times Square* to clarify the different approach of the minority view in *Araprop Development* compared with the statement in *LSSC Development Sdn Bhd* quoted above. However, the opportunity to draw on these cases appears to have been missed in *Berjaya Times Square*.

[69] In deciding the issue of whether a purchaser has a right to rescind the SPA upon breach, the minority view in *Araprop Development*, as we observed, applied the concept of total failure of consideration as a determining factor. However, after ruling out total failure of consideration, the minority

proceeded with its analysis on fundamental breach of the contract within the meaning of s. 40. This can be seen from the following paragraphs at pp. 167 to 168:

> [51] With respect, I am unable to agree with the respondents argument. *At common law the right to "rescind" a contract by way of termination only arises when there has been a total failure of consideration.* On the facts of the present case, there was no refusal by the appellants to perform the contract by not doing the things they promised to do within the time specified by the contract in its entirety. *There was no total failure of consideration.* From the Certificate for Stage of Construction of Works, it is clear that the appellants had completed their part of developing the said property on 27 April 1998 which was more than a year before the date for delivery of vacant possession, (*ie*, more than a year before 15 March 1999). What remained to be completed was the 'Remaining Basic Infrastructure'.
>
> [52] *It is evident from the record that the appellants had problems with TNB and there was delay in the electricity infrastructure. The delay in delivering up the property was caused by delays of the relevant authorities in circumstances beyond the appellant's control. This did not in my judgment amount to a failure to do all of the things that the appellants had promised. This is not a case where there was a fundamental breach on the part of the appellants resulting in the respondents being deprived of the whole benefit which was the intention of the parties they would obtain from the contract. Applying s. 40 of the Act, I am of the view that the appellants' breach did not go to the root of the contract.*
>
> (emphasis added)

[70] We also note that this court in *Berjaya Times Square* construed s. 40 of the Contracts Act 1950 (Act 136) based on a common law anchor when the learned panel referred to *Johnson & Anor v. Agnew* [1980] AC 367 and *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 All ER 556. We note that similar approach was also used in relation to s. 56(1) when the learned panel referred to *Jamshed Khodaram Irani v. Burjorji Dhurjibhai* AIR 1915 PC 83. This can be seen in paras. 4, 21, 22, 24 to 27 of the judgment in *Berjaya Times Square*.

[71] In that context, we are mindful of the influence of English law and the Indian Contract Act on our jurisprudence, noting that the objects and reasons to the Bill of the Contracts (Malay States) Ordinance 1950 provide as follows:

> OBJECTS AND REASONS
>
> At the present time considerable confusion prevails in the Federation regarding the law of contract. *In the Settlements the English law of contract applies, while in the former Federated Malay States and in Johore the Contract Enactment (Cap. 52) of the Federated Malay States (which is based on the Indian Contract Act) is in force.* In the remainder of the Federation, however, there is no express provision relating to contract, though, in general, the courts have had recourse to English law on the subject.

This Bill now seeks to re-enact the Contract Enactment of the Federated Malay States as a Federation Ordinance applicable to the Malay States, leaving the Settlements to continue under the English law, as at present.

A comparative table is attached.

STAFFORD FOSTER SUTTON,
Attorney-General, Federation of Malaya.

KUALA LUMPUR,
12th October, 1949.

(emphasis added)

[72] From our perusal of *Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 WLR 574 and *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 as referred to by this court in *Berjaya Times Square* at paras. 17 to 19 of the judgment, it is not entirely apparent to us that these cases provide the authority to establish the legal proposition that there exists a common law right to rescind a contract arising from a conflation of the right to terminate for breach or repudiation with restitutionary principles based on unjust enrichment. In both cases, the right to terminate the contract under review was never an issue. The focus of the judicial analysis in both cases was rather the right to restitution of sums paid after the contract was discharged. In addition, the paragraph cited from the work of *Golf & Jones* in para. 20 of the judgment refers to a claim for recovery of money paid, as an alternative to claiming damages, provided that the consideration for the payment has wholly failed. Essentially, in our considered view, the conflation of these legal principles, at its core, lacks any authoritative basis.

[73] Another basis to justify the common law right to rescind introduced in *Berjaya Times Square* was its reliance on *Johnson & Anor v. Agnew* [1980] AC 367 and *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 All ER 556 to establish Malaysia's position on the common law doctrine of repudiation under s. 40. This can be seen in paras. 20 to 24 of the judgment in *Berjaya Times Square*. Based on the reasoning, the legal proposition is that repudiation arises only if the promisor refuses to perform the whole of his promise or that there must be a total non-performance or that there was no performance in its entirety. It follows that partial performance, however defective, negates the right to terminate as there is no total failure of consideration. With respect, upon our perusal, there is no trace of this principle in the local jurisprudence or the common law (Lord Devlin, (1966), *The Treatment of Breach of Contract*, The Cambridge Law Journal, 24(2), 192-215; Hugh Beale (2024), *Chitty on Contracts* (35th edn) Sweet & Maxwell; Ewan McKendrick (2024), *Contract Law – Text Cases and Materials* (11th edn), Oxford University Press; Edwin Peel (2025), *Treitel on The Law of Contract* (16th edn), Sweet & Maxwell).

[74] In our considered view, the right to terminate a contract for repudiation under s. 40 does not depend on the question whether there is a total failure of consideration but rather the test is whether the actions of the party in default would lead a reasonable person to conclude that he no longer intends to be bound by the contract (*Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266; [1985] 2 MLJ 291). To our mind, the notion of total failure of consideration should not inform the interpretation of s. 40.

[75] Only after resolving the issue of termination under s. 40 does it become relevant to consider whether the innocent party may bring an action in restitution for money had and received, and in this respect, whether there has been a total failure of consideration. It seems to us that the doctrine of total failure of consideration is confined to cases concerning the availability of restitutionary relief rather than being used to determine whether the innocent party has a right to terminate a contract for breach and for claim in damages for breach. Therefore, in our considered view, the cause of action in contract for fundamental breach giving rise to a right to terminate is separate and independent of the cause of action in restitution for the recovery of monies where there is a total failure of consideration. Thomson J in *Kartar Singh v. Pappa* [1954] CLJU 32; [1954] 1 LNS 32; [1954] 1 MLJ 193 observed at p. 195 as follows:

> *The truth is that an action for money had and received has nothing in common with an action in contract*. In the case of contract the obligation arises from the agreement of the parties and in the present case it was for the performance of this obligation that the security was given. *In the case of an action for money had and received, the obligation is created by operation of law once certain facts which do not include agreement between the parties are established.*
>
> (emphasis added)

[76] Further, the test for total failure of consideration which this court in *Berjaya Times Square* adopted is "whether the party in default has failed to perform his promise in its entirety". This can be seen in para. 18 of the judgment which, upon our perusal, appears to be a reproduction of para. 7 in *Tan Ah Tong v. Chee Pee Saad & Anor And Other Cases* [2010] 6 CLJ 560. This court in *Berjaya Times Square* derived this test by citing *Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 All ER 883. However, a close examination of the relevant passage from the speech of Lord Goff of Chieveley in *Stocznia Gdanska* at p. 896 reveals that the true test is instead as follows: "The test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due". With respect, in our considered view, the test as laid down by the House of Lords was remodelled in *Berjaya Times Square* to fit a conflation of the doctrine of total failure of consideration and the test for repudiation or fundamental breach of a promise "in its entirety" under s. 40 as discussed above.

[77] It is also important to note that the legal proposition in *Berjaya Times Square* was distinguished in *Damansara Realty* as being confined to and supportable only on the particular facts of that case with this court stating at pp. 485 to 486 as follows:

> [58] In *Berjaya Times Square Sdn Bhd* it was held as long as some work has been done indicating that the development or construction had commenced, there would be no total failure of consideration because the promise had been performed although not in its entirety. On the facts of that case the decision may be supportable. *But we do not agree with the stand that there can be no total failure of consideration so long as part of the promise has been fulfilled*.
>
> [59] In our view, whether or not there has been total failure of consideration is a question of fact which can be resolved by looking at the circumstances of the case. Each case has its own peculiar facts. No two cases can be said to be identical although they may be similar. We are inclined to take the view that minimal works such as getting development permission orders or taking possession over the land for development purposes may not in most instances fall on the same side as Berjaya Times Square Sdn Bhd. *This is simply because such an interpretation does not make commercial sense. What good is a mere foundation of an office building to a company? In such circumstances, it must be taken as if the promise had not been fulfilled in its entirety*.
>
> [60] In fact in *Berjaya Times Square Sdn Bhd*, it did not rule as wrong the conclusions in the cases which allowed termination of the respective contracts on the ground that there was failure to complete the contractual works (see *Tan Yang Loong & Anor v. Newacres Sdn Bhd* [1992] 1 MLJ 289; *Chye Fook v. Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308; *Law Ngei Ung v. Tamansuri Sdn Bhd* [1989] 2 CLJ 44 (Rep); [1989] 2 CLJ 181). *As such the principle should therefore be this. There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there is a right to terminate the contract, but not in the latter instance.*
>
> [61] *In any event, the factual matrix of Berjaya Times Square Sdn Bhd is not in any way similar to the present case* in which it is beyond doubt that nothing has been done towards the development of the land for the past thirteen and a half years from the fifteen year period. By contrast, in that case, the project was substantially completed at the due date. The remaining issue was whether the delay in completion (which was eventually completed) could give sufficient reason for the innocent party to terminate on the ground that the delay resulted in a fundamental breach going to the root of the contract. It was held that it did not warrant for termination. Another difference of that case with the present is the complaint there was premised based on the due date, whereas in the present case, the due date was one and a half years away. This brings us to our next point for discussion.

A

> [62] *The right of an innocent party to terminate a contract or treat itself as having been discharged from the contract is mainly premised on the grounds of repudiation or fundamental breach …*
>
> (emphasis added)

[78] We acknowledge that *Damansara Realty* does not form part of the leave B question referred to us for determination. However, in *Damansara Realty*, we note that this court's continued reference to the principle of total failure of consideration in determining whether a breach entitles a promisee to terminate the contract suggests that the doctrine of total failure of consideration was correctly applied. By way of an *obiter dictum*, this court C restated the test for total failure of consideration by introducing new criteria: "There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of D consideration and accordingly the promise has been performed in part". With respect, in our considered view, the test goes beyond what Lord Goff of Chieveley in *Stocznia Gdanska* would have been recognised.

[79] Placing the test in *Stocznia Gdanska* and *Berjaya Times Square* side by E side, it may be observed that in the former, any performance by the promisor negates a total failure of consideration, whereas in the latter, only full performance by the promisor precludes it. As seen in *Berjaya Times Square*, this court acknowledged that the construction of the property had been completed, *albeit* beyond the stipulated time, the appellant had not failed to F perform its obligations "in its entirety" and, therefore, ruled out a total failure of consideration. This can be seen in paras. 4, 6, 33 and 35 of the judgment in *Berjaya Times Square*.

[80] Low Weng Tchung (2015), in his work, made the following observation at pp. 466 to 467:

G

> [6.134] ... It may be observed that there is a very significant difference between the principle if the promisor has performed any part of his promise in respect of which payment is due, there is no total failure of consideration (*Stocznia*) and the proposition that if the promisor has performed his promise in its entirety, there is no total failure of consideration (*Berjaya*). *In the former situation performance may be partial; in* H *the later situation performance must be complete. If the latter proposition is correct, this would mean that in almost every case where a contract is terminated due to breach of contract there would be a total failure of consideration, since the contract breaker must necessarily have failed to perform his promise in its entirety …*
>
> (emphasis added)

I **[81]** In *Damansara Realty,* this court understood *Berjaya Times Square* as stating that as long as some work has been done, there would be no total failure of consideration because the promise had been performed, *albeit* not in its entirety. However, the *obiter* in *Damansara Realty* went on to state that

total failure of consideration could still occur even if part of the promise has been performed, depending on whether such performance, viewed objectively from the perspective of a reasonable and commercially sensible man, is of a nature that has some value in the context of the agreement between the parties. This can be seen in paras. 58, 59 and 60 of the judgment in *Damansara Realty*. In our considered view, the test in all these cases is at variance. Further analysis of the test for total failure of consideration will be undertaken when we address the relevant questions.

[82] To our mind, once the conflation is untangled (namely, when the restitutionary principle of total failure of consideration is no longer applied to determine whether a breach entitles a promisee to terminate the contract under s. 40), the question of whether the extent and nature of the performance has a value from the perspective of a commercially sensible bystander becomes immaterial as the nature and extent of the breach will instead be assessed based on the test for repudiation or fundamental breach under s. 40. Therefore, in relation to *Damansara Realty*, we take notice of the view of the learned author, Visu Sinnadurai (2023), who made the following remarks at p. 1163:

> While it was understandable that the Federal Court in *Bungsar Hill* was reluctant to expressly declare *Berjaya Times Square* as no longer being good law, given that *Berjaya* was only decided less than two years prior to *Bungsar Hill*, *the Federal Court's attempt to further explain what amounts to 'total failure of consideration' was arguably unnecessary, given that the Federal Court had in any event reaffirmed the common law test of repudiatory breach or fundamental breach as grounds for termination of discharge of a contract*.
>
> (emphasis added)

[83] David Fung Yin Kee (2019), in his work, articulated at pp. 188 to 189 as follows:

> [44] Fourth, the fact that *in some cases it might well be there is also a total failure of consideration on the facts but that is a result after breach which is not a test for a "fundamental breach" or breach of fundamental term or breach of a term which goes "to the root of the contract" that would give the promisee the right to terminate if he so elects. The emphasis is on the nature of the breach*, foreseeable consequences of the breach, and any event resulting from the breach which would have deprived the promisee from obtaining a substantial part of the benefit if the contract obligations *in futuro* were not performed under the *Hong Kong Fir* doctrine. *One would discern that for the third factor, the focus is on the promisee not obtaining the benefit of the contract because of the breach. Whereas, for the test of total failure of consideration, the focus is on whether it is unjust if the benefit already conferred on the promisor is retained since the basis (or condition or consideration, all synonyms in this context) for the transfer of the benefit by the promisee has failed, or failed totally for those who insist on a total failure of consideration*.
>
> (emphasis added)

[84] Given the context of the conflation that led this court to restate the test for failure of consideration on two occasions departing from the original test as laid down in *Stocznia Gdanska*, it is not difficult to foresee its effects as binding precedent in the adjudication process of the lower courts. In essence, breach of contract or repudiation giving rise to the right to terminate is governed by its own test and set of principles and entails effects and remedies that are entirely distinct from those of restitution based on unjust enrichment.

[85] The conflation of principles for breach of contract and restitution into a single operative construct under s. 40 read together with s. 56(1) is, therefore, an erroneous judicial development in *Berjaya Times Square* at the expense of legal certainty.

[86] Our anxiety is soothed by the knowledge that we are not alone in that regard. The preponderance of academic opinion seems also to be against conflating the doctrine of total failure of consideration with breach of contract. Visu Sinnadurai (2011) observed at pp. 1038 to 1039 as follows:

> *The emergence of this so-called doctrine of total failure of consideration in the context of breach of contract under Malaysian law seems to be of recent origin ... Rightly, no standard text on the law of contract dealing with a chapter on breach has any discussion on 'total failure of consideration'. The doctrine of total failure of consideration rightly belongs to the realm of the law of restitution (See Goff & Jones The Law of Restitution (7th Edn). See also Chitty and Treitel above).* Even in cases of frustration and mistake, one talks of total failure of consideration only in the context of restitution after an agreement has become void ... *It is quite clear from the discussion above that the Federal Court in Berjaya Times Square went off tangent when it based its decision on the concept of total failure of consideration in a case dealing with the general principles of the laws of contract and not one on the law of restitution.*
>
> (emphasis added)

[87] The learned author continued at pp. 1046 to 1047 as follows:

> From the discussion above, it would be plain that the decision of the Federal Court in *Berjaya Times Square* is difficult to explain. It departed from well established principles of law and attempted to introduce new interpretation to the provisions of the Contracts Act. There is no doubt that judges in subsequent cases may have difficulties in understanding and applying it.

[88] David Fung Yin Kee (2019), in his work, observed at pp. 202 to 203 as follows:

> [77] However, the use of "the common law right to rescind" in the manner done by the Federal Court in *Berjaya Times Square* and by the Court of Appeal in *LSSC Development* and *Tan Ah Chong* is not supported by authority. *It was the unprincipled merger of principles governing breach of contract and repudiation, in particular the Hongkong Fir doctrine, with principles governing restitution as a legal response to an unjust enrichment. The Federal Court had done this through the deployment of the restitutionary concept of total failure of consideration into an analysis for whether there is a breach of contract or repudiation*

which gives rise to a right of termination. This must be avoided. The spate of reported cases post *Berjaya Times Square* which showed an inordinate volume of litigation on a common transaction yielding inconsistent decisions are perhaps further evidence *that the concept of total failure of consideration is not the test to be used in the determination of whether there is a right to terminate the contract and achieve status quo ante for the contract parties.*

[78] *The use of the concept of total failure of consideration in the determination of whether there is a breach of contract or repudiation has the effect of wrongly curtailing the ambit of both sections 40 and 56 of the Contracts Act 1950. This is extremely harmful as these doctrines have separate ancestry and principles to determine the question of whether the right to terminate is available.*

[79] The Federal Court's decision in *Berjaya Times Square* is to be strictly restricted to the fact situation where the promisee wants to *rescind ab initio* a contract for breach of contract or repudiation so that the contract parties would be restored to a position as if the contract had never been made. Only such a case would attract "the common law right to rescind" espoused by the Federal Court in *Berjaya Times Square* and prior to that by the Court of Appeal in *LSSC Development* and *Tan Ah Chong*. However, *it has been argued here that that legal proposition is unstable: an erroneous merger of two inconsistent rights. The innovation is also not needed, for orthodoxy already supply the answers.*

(emphasis added)

[89] In the same vein, Cheong May Fong and Lee Yin Harn (2016), in their contribution, observed at pp. 37 to 39 as follows:

[2.056] In stating that at common law there is a limited right to rescind which in essence is "the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration," *the court in Berjaya has failed to distinguish the cause of action in contract of serious breaches giving rise to a right to terminate, and of the cause of action in restitution for the recovery of monies where there is a total failure of consideration.*

[2.059] ... This may be a possible reason that led the Court of Appeal in *Sik Hong Photo Sdn Bhd v. Ch'ng Beng Choo (mendakwa bagi dan pihak harta pusaka Ng Hua, si mati)* to incorrectly hold that 'the fundamental breach entitled the innocent party to rescind the contract and to have the parties restored to a position where they will stand as if the contract had never been made, *ie*, the return of property by way of restitutio in integrum.' *To avoid any such possible dangers, it is submitted that the concept of total failure of consideration, which has quasi-contractual origins should be avoided in the context of s. 40. The courts have traditionally followed the common law concepts of repudiation and fundamental breach or breach which goes to the root of the contract, which has usefully assisted in interpreting situations "when a party has refused to perform, or disabled himself from performing, his promise in its entirety" so as to entitle the innocent party to terminate the contract*.

(emphasis added)

[90] Low Weng Tchung (2015), in his work, echoed a similar view at pp. 467 to 468 as follows:

> 6. 137 … *In this regard, it may be observed that the decisions of the Federal Court in Berjaya Times Square and Damansara Realty are in fact not relevant to the law of restitution and unjust enrichment. This is because in both cases, the court had utilised the concept of total failure of consideration as a test for terminating or rescinding a contract due to breach. It is submitted that these decisions do not lay down any test to be applied when a plaintiff, following termination of a contract, claims for restitution on the ground of total failure of consideration.*
>
> (emphasis added)

[91] Lastly, J W Carter (2011), in his contribution, observed at pp. 94 to 95 as follows:

> Taken together, ss. 40 and 54 of the Contracts Act recognise a right to terminate for serious breach. Although in my view it is purely a matter of terminology, there seems no reason to doubt that such serious breaches could not legitimately be termed 'fundamental breach'. The words used in s. 40 – 'refused to perform, or disabled himself from performing' – are broad. They are sufficient to incorporate several of the situations which (under the common law) are often regarded as illustrating a right to terminate for 'fundamental breach'. In addition, since the common law has always taken a broad view of 'prevention', conduct which activates s. 54 could easily be termed a 'fundamental breach'. Moreover, the common law also regards termination for breach of an essential time stipulation (s. 56(1) of the Contracts Act) as based on a serious breach. Although s. 56(2) does not expressly contemplate a right to terminate for failure to perform a non-essential time stipulation, that is the result of other provisions, including s. 40. It follows that, so far as the right to terminate is concerned, the Contracts Act substantially reflects the common law.
>
> Therefore, Malaysian decisions which have treated the Contracts Act as giving effect to discharge for fundamental breach (including breach of 'fundamental term'), the intermediate term idea and, more generally, the principles stated in the *Hong Kong Fir* case, are fully justified. *There is, moreover, nothing to suggest that serious ('fundamental') breach is not sufficient. In particular, I do not agree that s. 40 is inapplicable if there is part performance, or (what amounts to the same thing) that it applies only if there is a total 'failure of consideration'. Application of either approach would restrict the right of termination to wholly executory contracts, which is contrary to the general thrust of the cases. Similarly, although the terminology differs, the right conferred by s. 40 is of the same nature as that conferred by s. 56(1). But neither limits the other.*
>
> (emphasis added)

[92] We feel it right to record as part of this judgment that our analysis of *Berjaya Times Square* is based solely on the face of the grounds of judgment. As with other judicial scrutiny expected of our role, we are not privy to what transpired during the hearing as the matter was decided before our time. In hindsight, reviewing a precedent may appear to be a straightforward task especially with the benefit of academic commentaries and the parties'

submissions before us which often highlight its shortcomings. Indeed, this is the beauty of the law and due process. Generally, we also acknowledge that, on some occasions, judges must scavenge through submissions and conduct independent research in pursuit of the correct authorities, on the one hand, to ensure that justice is properly dispensed and, on the other, some are often too elegant to reveal the difficulty encountered along the way (*Yeap Hock Seng v. Minister For Home Affairs, Malaysia & Ors* [1975] CLJU 207; [1975] 1 LNS 207; [1975] 2 MLJ 279). Yet, once on record, the shortcomings lie with the judges and with them alone.

[93] Be that as it may, the test and scope of application for the common law restitutionary doctrine of total failure of consideration, as formulated in *Berjaya Times Square*, has stood for more than a decade in our jurisprudence. With the problems addressed, the question that now remains is whether this position should be changed and the law restated? Do the present appeals truly warrant this court's departure from *Berjaya Times Square*? Is it high time to confront and root out this legal conundrum? What we are rather certain of is that, in any event, our enthusiasm to see the law clarified cannot get the better of our duty to determine the present appeals before us.

Appeal No. 22: The Return Of RM23,000,000 To The Defendant

[94] We pause here to turn our attention to the specific questions laid before us:

(i) question 1: Whether the doctrine of a total failure of consideration, as an equitable doctrine, could be invoked by the defendant to recover from the plaintiffs a sum of RM23,000,000 which sum had previously been declared by the High Court in a related suit (affirmed on appeal) as non-recoverable because it comprised part of an illegal moneylending transaction engaged in by the defendant and in which proceedings the defendant was declared as an unlicensed moneylender?

(ii) question 2: Whether the doctrine of a total failure of consideration, as an equitable doctrine, could be invoked by the defendant to recover a sum of RM23,000,000.00 from the plaintiffs when the defendant was held by the High Court in the present case as the party who had caused the loss and on which "loss" he had based his claim of a total failure of consideration?

[95] The fulcrum of the plaintiffs' appeal lies in the legality and enforceability of the assignment agreement dated 20 October 2015 and the undated supplemental assignment agreement. As alluded to above, it is the concurrent finding of the learned High Court Judge and the learned panel of the Court of Appeal that the plaintiffs' SPA with DA Land dated 23 June 2015 is valid, as are the assignment agreement dated 20 October 2015 and the undated supplemental assignment agreement, both entered into between the plaintiffs and the defendant.

[96] Upon our careful perusal, we agree with the approach adopted by the learned panel of the Court of Appeal wherein Their Lordships considered the application of s. 103 of the Evidence Act 1950 (Act 56) and s. 66 of the Contracts Act 1950 (Act 136) in the context of the defendant's contention that these agreements are void for illegality. The learned panel correctly applied the law in concluding that there was no evidence of illegality in the plaintiffs' SPA with DA Land. The defendant has failed to discharge the burden of proof to establish that the said SPA contravened the Moneylenders Act 1951 (Act 400) or that the assignment agreement and the supplemental assignment agreement were tainted with illegality arising from the alleged contravention.

[97] We agree with Their Lordships' findings and we shall refrain from further analysis of the evidence and findings thereon. In our judgment, the plaintiffs' SPA with DA Land dated 23 June 2015, and the assignment agreement dated 20 October 2015 and the undated supplemental assignment agreement, both entered into between the plaintiffs and the defendant, are valid and enforceable.

[98] The same, however, cannot be said of the defendant's SPA with DA Land. As evident from the Shah Alam High Court judgment in Suits 396 and 88, of which we shall take judicial notice, the defendant's SPA was declared void for illegality and uncertainty. Given that the doctrine of restitution based on total failure of consideration is an equitable principle, we must direct our focus to the conduct of the defendant before we can determine whether he has come with clean hands and is entitled to recover the RM23,000,000 from the plaintiffs through the conscience of this court.

[99] For a start, we, however, cannot help but question the position taken by defendant. If the assignment agreement and the supplemental agreement were indeed void for illegality as asserted by the defendant, though they are not, the loss would lie where it falls. In that event, it becomes difficult to see how the defendant's claim over the RM23,000,000 could be sustained? Abdul Rahman Sebli CJSS in *Triple Zest Trading & Suppliers & Ors v. Applied Business Technologies Sdn Bhd* [2023] 10 CLJ 187; [2024] 1 MLRA 144 observed at p. 151 as follows:

> [26] This not only goes against the object of MA51 which is for the 'regulation and control of the business of moneylending, the protection of borrowers of monies lent in such business, and matters connected therewith' (see the preamble to MA51) but is also against **the trite principle that a loss lies where it falls when an agreement is found to be illegal.**
>
> (emphasis added)

[100] As the plaintiff's SPA with DA Land, the assignment agreement and the supplemental assignment agreement were previously held to be valid contracts by the High Court and the Court of Appeal, we are of the

considered view that the defendant could not maintain any claim in restitution against the plaintiffs. The assignment agreement remains valid and binding, governing the rights and liabilities of the parties under its terms thereby leaving no room for restitution. Perhaps greater consideration could have been given by the learned panel of the Court of Appeal to this aspect of the law.

[101] Azahar Mohamed FCJ in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441 observed at p. 491 (CLJ); p. 479 (MLJ) as follows:

> [107] *We pause here for a moment to underline the significance of the law of unjust enrichment in relation to all the rights of the parties to a contract which has been validly terminated*. The critical issue that needs to be addressed is what constitutes unjust enrichment and undue benefit, and in what manner should a purchaser of vacant land be granted restitutionary relief when he has constructed a building on the said piece of land pursuant to and expressly permitted by a contract between him and the vendor. In our view, the following issues are important to determine the outcome of this appeal. *Is it fair and equitable for the purchaser upon the termination of contract* to be awarded only the cost of construction of the building, in this case the mall, or the market value of the mall?
>
> (emphasis added)

[102] On this subject, we agree with the analysis made by Low Weng Tchung (2015) who articulated in his work at p. 430 as follows:

> "[6.91] ... *It should be recalled that at common law, a plaintiff who seeks restitution of benefits transferred to a defendant on the ground of failure of consideration must first establish that the contract between the plaintiff and the defendant has ceased to be operative and effective. This is because if the contract remains valid and binding, the rights and liabilities of the parties will continue to be governed by the terms of the contract.*
>
> (emphasis added)

[103] The learned author also made the following analysis at p. 61 as follows:

> [2.25] ... *Generally speaking, if there has been a transfer of value by a plaintiff to a defendant pursuant to a contract which is voidable, for example due to speaking, if there has been a transfer of value by a plaintiff to a misrepresentation, duress or undue influence or where there has been a fundamental breach of contract, the plaintiff may not claim for restitution of the value transferred to the defendant unless and until the plaintiff has first elected to avoid and set aside the contract. This is because unless and until the contract is set aside, the rights and liabilities of the parties continue to be governed by the contract, and the law of restitution will not be utilised to undermine the contract or redistribute risks allocated thereunde*r. As Lord Goff observed in *Dimskal Shipping Co SA v. International Transport Workers Federation (The Evia Luck) (No 2)*:
>
> > It was common ground between the parties before your Lordships that the money in respect of which the owners claimed restitution was paid to the I.T.F. under a contract, *albeit* a contract which the

A owners claim to have been voidable by them, and indeed to have been avoided by them, on the ground of duress. *It follows that, before the owners could establish any right to recover the money, they had first to avoid the relevant contract. Until this was done, the money in question was paid under a binding contract and so was irrecoverable in restitution.* But once the contract was avoided, the money paid under it was
B recoverable in restitution ...

The general rule that the law of restitution or unjust enrichment becomes relevant only when the contract between the parties ceases to be operative was also alluded to by the Federal Court in Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd, where the court underlined the significance of the law of unjust enrichment in
C relation to all the rights of the parties to a contract which has been validly terminated.

(emphasis added)

[104] Our attention is next directed to a further point of contention advanced by the defendant. Learned counsel for the defendant argued that the plaintiffs
D did not plead that the defendant was found to be an unlicensed moneylender in Suits 396 and 88 nor that the defendant is an unlicensed moneylender in the main suit. Upon our perusal, the plaintiffs expressly pleaded that the Rawang 3 transaction was tainted with illegality under para. 5a of their reply and defence to counterclaim dated 3 August 2020 which, in our considered
E view, is sufficient. We, however, wish to add that the proceedings in Suits 396 and 88 were referred to by both learned counsel for the plaintiffs and the defendant in their written submissions before the courts below and were also mentioned by the learned High Court Judge and the learned panel of the Court of Appeal in Their Lordships' judgments. Further, we may take
F judicial notice of past proceedings, including Suits 396 and 88, particularly where they are related and form part of the records and archives accessible to this court. The illegality of the defendant's SPA arises from the facts in evidence in Suits 396 and 88.

[105] In our considered view, if our courts are empowered to take judicial
G notice of illegality at any stage, whether at trial or on appeal, regardless of whether it has been pleaded where the contract is *ex facie* illegal or that, when the contract is not *ex facie* illegal, facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality (*Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173; [1992] 2 MLJ 281; *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl*
H *Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619), then there is no reason why judicial notice cannot also be taken of past related proceedings involving such illegality especially where those proceedings have been referred to and relied by the parties in their written submissions. In that context, this court ought not to be seen as lending its aid to any illegality or unconscionability
I particularly where the conduct of the defendant has already been subjected to judicial scrutiny and findings in related proceedings.

[106] This brings us to the next contention of the defendant that the RM23,000,000 paid by the defendant to the plaintiffs in the main suit has no relationship whatsoever with the RM23,000,000 paid by the defendant in Suits 396 and 88. In other words, the defendant has paid RM23,000,00 pursuant to the assignment agreement and the supplemental assignment agreement and the defendant has also paid another RM23,000,000 pursuant to the defendant's SPA.

[107] It was argued for the defendant that the plaintiffs have never pleaded that they have returned the RM23,000,00 counterclaimed by the defendant in the main suit back to the defendant for the defendant to use the amount in the defendant's SPA in Suits 396 and 88. It is also the finding of the learned High Court Judge in Suits 396 and 88 that the RM23,000,000 deposit in the defendant's SPA have been paid by the defendant to DA Land and that it is not the finding of the Court of Appeal that the RM23,000,000 in the main suit is the same RM23,000,000 in Suits 396 and 88.

[108] With all due respect, we are not convinced. The learned High Court Judge in Suits 396 and 88 found that the defendant had paid a deposit of RM23,000,000 to DA Land which DA Land was entitled to forfeit. It was also the finding of the learned High Court Judge in these suits that, based on the testimonies of the defendant's solicitor and the evidence presented, no actual cash or cheque payments were made and no actual monetary payment of RM23,000,000 could be confirmed. The defendant's testimonies, on the other hand, revealed that some payments were made through "contra" transactions (offsetting debts) and settling debts. Therefore, the learned High Court Judge ruled that there was no certainty regarding the actual amounts paid by the defendant and that the defendant failed to provide evidence to prove the payment of RM23,000,000. Despite these uncertainties, the learned High Court Judge ruled that DA Land was entitled to forfeit the deposit based on the contractual terms of the defendant's SPA.

[109] Therefore, in our considered view, this shows that the forfeiture was enforced as a legal consequence of the SPA regardless of whether the deposit had been fully paid in the conventional sense. In other words, what forfeited was the defendant's contractual right to claim the RM23,000,000 deposit from DA Land rather than any actual transfer of funds. In our judgment, the RM23,000,000 purportedly paid by the defendant to DA Land is not a separate and distinct amount but, in reality, relates to the same RM23,000,000 paid to the plaintiffs.

[110] Paragraph 14 of the defendant's written submissions to support Appeal 449 and to oppose Appeal 439 before the Court of Appeal states:

> *During the execution of the defendant's SPA, the Chew Brothers expressed their consent for the defendant and the plaintiffs to utilize the RM25,500,000.00 in the assignment agreement to settle the deposit required by the defendant's SPA as the Chew Brothers acknowledged that DA Land was owing the plaintiffs the same*

A *amount of money as well*. The Chew Brothers issued a letter (page 50 Enclosure 31) confirming this arrangement as well. Hence, the defendant was not required to take back the RM23,000,000.00 previously paid to the plaintiffs pursuant to the assignment agreement plus asking for another RM2,500,000.00 from the plaintiffs and re-make another payment in the total sum of RM25,500,000.00 to DA Land as deposit pursuant to the
B defendant's SPA.

(emphasis added)

[111] With respect, we are unable to accept the defendant's version of the factual background regarding the contents of the said acknowledgement letter by DA Land since from the very beginning of the trial of the main suit the
C Chew Brothers, who are the alter ego of DA Land, were not called to testify. Upon our perusal, the contents of the said letter, which we have reproduced at para. [16] of this judgment, at most, objectively point to the fact that the defendant's consideration of RM25,500,000 paid under the assignment agreement to the plaintiffs (of which a total sum of RM23,000,000 was paid
D directly by the plaintiffs to DA Land under the plaintiffs' SPA with DA Land dated 23 June 2015) was declared as the deposit to DA Land.

[112] It is clear that the amount of RM23,000,000 paid under the plaintiffs' SPA with DA Land is the same amount that was utilised as deposit by the defendant under the defendant's SPA with DA Land. This was acknowledged
E to by DA Land through an acknowledgment letter which makes reference to the plaintiffs and Rawang 4 which are the subject matter of the assignment agreement.

[113] Furthermore, the acknowledgement letter, issued on DA Land's
F letterhead and signed by the Chew Brothers, is relied upon by both the plaintiffs and the defendant. It was not the defendant's case that the acknowledgment letter was procured through fraud, forgery, duress, undue influence or that misrepresentation was involved nor that its contents are misleading or inaccurate. As such, the contents of the letter must be accepted at face value without further elaboration on its factual background.

G

[114] Taken in their entirety, in our considered view, the main suit from which the present appeals originate and Suits 396 and 88 are not only related by their factual background, the parties involved and the subject lands in dispute but also, and more significantly, by the same sum of RM23,000,000
H that flows through the plaintiffs, the defendant and DA Land.

[115] Moving on to the defendant's next point of contention, counsel for the defendant argued that the assignment agreement is not known to DA Land until April 2016. DA Land is not a party to the assignment agreement and the supplemental assignment agreement. The contents of the assignment
I agreement are only within the knowledge of the plaintiffs and the defendant. It was further argued for the defendant that the letter dated 2 October 2015

which we have reproduced at para. [10] of this judgment, referred to in recital 12 of the assignment agreement, was relied upon by the plaintiffs to infer that DA Land had knowledge of the assignment agreement and of the defendant's interest in Rawang 4 prior to April 2016. The plaintiffs relied on this letter, in which the price payable by the defendant under the assignment agreement was stated as RM25,500,000, being the original price before it was reduced to RM23,000,000 under the supplemental assignment agreement. There is no evidence to show that DA Land has received this letter.

[116] Learned counsel for the defendant added, two more letters were relied on to infer DA Land's knowledge of the assignment. We note that the contents of these letters are identical, save that in the title of one of the letters, the words "Price:84million" are omitted. The version without these words is referred to by the plaintiffs in their written submissions as noted at para. [9] of this judgment whereas the version containing those words is referred to by the defendant as noted at para. [16].

[117] According to the defendant, these letters do not bear any date nor do they indicate that they are an acknowledgment of the letter dated 2 October 2015 or that they relate to the assignment agreement dated 20 October 2015. In these letters, DA Land acknowledges that the defendant has paid the plaintiffs a sum of RM25,500,000 as part payment towards the purchase price payable by the defendant to DA Land. Learned counsel for the defendant contended that these letters have no connection to the assignment agreement under which RM25,500,000 would constitute full payment. Rather, these letters pertain to the defendant's SPA, as it is only under the defendant's SPA that RM25,500,000 could represent part payment towards the RM84,000,000 purchase price.

[118] Learned counsel for the defendant further submitted that, had DA Land been aware of the execution of the assignment agreement on 20 October 2015, the company would also have been aware of the defendant's existence and his beneficial interest in Rawang 4 pursuant to the assignment agreement. Accordingly, when the company commenced Suit 688 on 17 December 2015, it would have named the defendant as one of the defendants in the suit.

[119] With all due respect, we are not impressed. What is rather striking is the absence of any cogent explanation as to why the defendant would need to abandon the binding assignment agreement and the plaintiffs' SPA with DA Land, and instead enter into a separate SPA to purchase three out of the four parcels of land at the staggering price of RM84,000,000? In our considered view, this does not reflect the measured business judgment of a reasonably prudent purchaser. Additionally, given that the assignment carried a contractual value of RM25,500,000, a reasonably prudent assignee in the ordinary course of business would have been expected to act with due diligence by verifying the position with DA Land at the time of signing the

assignment agreement dated 20 October 2015 (*Bickerton v. Walker* (1885) 31 Ch D 151; *Roberts v. Jules Consultancy Ltd* [2021] NZCA 303). This is especially so after reading para. 12 of the recitals which expressly refers to DA Land's consent to the said assignment. The defendant's contention that DA Land lacked knowledge of the assignment prior to April 2016 sits uneasily with the defendant's status as a reasonably prudent assignee at the time of contracting.

[120] With neither DA Land nor the Chew Brothers called to testify at trial to explain the alleged discrepancies in the contents of the two letters, the defendant cannot now contend that the assignment agreement was unknown to DA Land until April 2016. In our considered view, the defendant's argument on this point remains, at best, a mere conjecture. We agree with learned counsel for the plaintiffs that the acknowledgement letter issued by DA Land repudiates the defendant's assertion that DA Land had no knowledge of the assignment agreement.

[121] The defendant's next point of contention is that the plaintiffs were fully aware of and had consented to the execution of the defendant's SPA as at the date it was formed on 24 May 2016. To support this contention, first, the defendant argued that the plaintiffs did not sue DA Land for executing the defendant's SPA which effectively transferred the plaintiffs' property in three parcels of land in Rawang 4. Second, it was only by way of the plaintiffs surrendering their rights of Rawang 4 through the settlement agreement dated 9 May 2016 which was later formalised as a consent judgment of Suit 688 that the defendant could enter into the defendant's SPA for Rawang 3 with DA Land. Third, according to the defendant, it is impossible to not let the defendant execute the SPA with DA Land for Rawang 3 because it is impossible for the plaintiffs to complete the plaintiffs' SPA, the assignment agreement and the supplemental agreement when one parcel of land from Rawang 4 had been sold to Mr Ho Fook Cheoy on 22 July 2014. Fourth, based on the evidence of PW1, the sum paid by the plaintiffs to DA Land is only RM20,000,000, while the consideration stated in the plaintiffs' SPA is RM23,000,000 indicating that the plaintiffs' SPA has not yet been completed as there remains an outstanding balance of RM3,000,000.

[122] Connected to these points, learned counsel for the defendant continued that the defendant's knowledge of Ho's caveat is immaterial. Pursuant to cl. 3 of the assignment agreement, the defendant is expected to receive the right of Rawang 4 free from any claims, caveat, charges and/or encumbrances. Ho's caveat is an encumbrance that is not removable and it follows that it is impossible for the plaintiffs to complete the assignment agreement and the supplemental assignment agreement for Rawang 4.

[123] With respect, we disagree. From the outset, the defendant's case is that upon being confronted with Mr Ho Fook Cheoy's transaction involving one parcel of Rawang 4, the plaintiffs had allegedly expressed regret for having

concealed the information from the defendant and that, with the consent of both the plaintiffs and DA Land, the defendant entered into an SPA dated 1 October 2015, signed on 24 June 2016, with DA Land for the purchase of Rawang 3. In our considered view, the defendant should have led his case about the plaintiffs' knowledge of the defendant's SPA along this line of argument. Instead, the defendant sought to support his case by drawing an implication based on the plaintiffs' indecisiveness or inaction in not suing DA Land. The defendant also attempted to impute such knowledge based on possibilities arising after the settlement agreement dated 9 May 2016 and Mr Ho Fook Cheoy's transaction. In our view, the plaintiffs' knowledge of the defendant's SPA cannot be inferred from the likelihood of probabilities. Actual knowledge must rest on more than speculative inference and cannot be established without concrete facts.

[124] The same, however, cannot be said of the defendant's knowledge of Ho's caveat. The defendant is deemed to be aware of the caveat by virtue of the plaintiffs' SPA and the assignment agreement. As alluded to above, under s. 5 of the Second Schedule of the plaintiffs' SPA, it is DA Land's contractual obligation to remove the caveat and to deliver vacant possession free from the encumbrance of Ho's caveat. Furthermore, the plaintiffs' SPA with DA Land is referred to in cl. 4A of the assignment agreement and the original copy was deposited by the plaintiffs with the defendant's solicitors. In our considered view, cl. 3 of the assignment agreement must be read together with s. 5 of the Second Schedule of the plaintiffs' SPA. The defendant entered into the assignment agreement with the plaintiffs being fully aware of Ho's caveat and the associated risks that followed. Additionally, with the assignment agreement assigning to the defendant the enforceable contractual rights under the plaintiffs' SPA with DA Land, we take the view that the defendant's proper recourse in relation to the removal of Ho's caveat lies against DA Land, not the plaintiffs (*Offer-Hoar v. Larkstore Ltd* [2006] EWCA Civ 1079; *Linden Gardens Trust Ltd v. Lenesta Sludge Disposals Ltd* [1994] 1 AC 85). Therefore, the defendant cannot rely on Ho's caveat as a pretext to avoid the legal effect of the assignment agreement and to justify the subsequent execution of a separate SPA with DA Land.

[125] Based on the issues revolving around Ho' caveat and the inadequacy of the plaintiffs' consideration to DA Land, the defendant argued that the plaintiffs' SPA, the assignment agreement and the supplemental assignment agreement have not been completed. However, no direct authority has been cited by the defendant to support the proposition that, as a matter of general contract principles, an assignment is rendered unenforceable merely because the assignor has not completed payment of the full purchase price under the original SPA from which the assignment stems particularly where the assignment was executed with the knowledge or consent of the party to whom the payment is due. Neither were we invited to deliberate on any authority supporting the proposition that an assignment is rendered

unenforceable merely by reason of the existence of a private caveat where the assignee was made aware of the caveat at the time of contracting and the obligation to remove such caveat lies with the assignor subject to the contractual obligation of the original proprietor of the land.

[126] We wish to highlight that the learned High Court Judge hearing the main suit observed that all the losses suffered by the defendant were not caused by the plaintiffs but it was caused by the defendant's own greedy actions. As it is apparent from the High Court notes of proceedings dated 20 December 2021 during parties' clarification, this observation was made following a response by learned counsel for the defendant at trial to a query from the learned judge wherein learned counsel for the defendant replied as follows:

> YA Plaintiffs must pay back?
>
> LCW Yes. There are two illegal moneylending transactions. The first one is between the plaintiff and DA Land. That one Mr Ong is entitled to claim for restitutionary claim. And then when Mr Ong entered into another transaction by himself with DA Land, originally a genuine transaction, later on Mr Ong, if I may say so, got greedy seeing how much profit that the plaintiffs are making in the transaction between the plaintiffs and DA Land, Mr Ong actually converted that into illegal moneylending transaction also. That's why the judge said no, whatever you have paid you are not able to claim.

Further, upon our perusal of the notes of proceedings, the defendant failed to adduce any evidence of payment of RM23,000,000 by himself to the plaintiffs. The relevant part of the notes of proceedings is reproduced as follows:

> YA That's why I have problem. I did not see before me anything showing Mr Ong paying the RM23 million, yes?
>
> LCW Yes, I understand, My Lord.

This was conceded by the defendant's counsel during the trial. As alluded to above, the learned High Court Judge dismissed the defendant's counterclaim for recovery of the said amount.

[127] Looking at the transactions, contracts and supporting documents within the appeal records as a whole, we are unable to comprehend or appreciate the defendant's overall case and conduct in any other light than that he had wrongfully reapplied and utilised the sum of RM23,000,000 in his transaction with DA Land which was subsequently found to constitute an illegal moneylending arrangement and ultimately forfeited by DA Land as evident from the Shah Alam High Court judgment in Suits 396 and 88.

[128] To our mind, the defendant is the architect of his own loss and misfortune by his subsequent unilateral dealing with DA Land. The plaintiffs, however, were not involved in the defendant's subsequent SPA with DA Land which was done without their knowledge. What the defendant is effectively attempting to do now is to recover the same sum of RM23,000,000 through a different route and by invoking a purported new cause of action. It would be manifestly unconscionable for the defendant to claim for restitution of the amount against the plaintiffs, more so on monies that the defendant himself had not paid. Equity will not permit the defendant to reclaim the amount from the plaintiffs on the ground of a total failure of consideration. In the premises, the defendant's unconscionable conduct bars his claims for restitution and unjust enrichment. In our considered view, that which cannot be done directly cannot be achieved indirectly.

[129] In our judgment, the law is clear. Unconscionable conduct on the part of a claimant would defeat a claim for restitution. In *Roxborough And Others v. Rothmans of Pall Mall Australia Ltd* [2001] 185 ALR 335, the High Court of Australia cited with approval the old authorities of *Moses v. Macferlan* [1760] 2 Burr 1005 referred in *Muschinski v. Dodds* [1985] 160 CLR 583 and further articulated at p. 365 as follows:

> [100] *In all of these areas, as in Moses v. Macferlan, notions derived from equity have been worked into and in that sense have become part of the fabric of the common law*. Hence the statement in *Baltic Shipping* by Deane and Dawson JJ where, after indicating that the indebitatus count for money had and received was framed in the traditional language of trust or use, their Honours continued:
>
> > [I]n a modern context where common law and equity are fused with equity prevailing, the artificial constraints imposed by the old forms of action can, unless they reflect coherent principle, be disregarded where they impede the principled enunciation and development of the law. In particular, the notions of good conscience, which both the common law and equity recognized as the underlying rationale of the law of unjust enrichment, now dictate that, in applying the relevant doctrines of law and equity, regard be had to matters of substance rather than technical form.
>
> Earlier, in *Muschinski v. Dodds*, 151 Deane J, after referring to *Moses v. Macferlan*, and to 'the general equitable notions which find expression in the common law count for money had and received', identified *the operation of most of the traditional doctrines of equity as operating upon legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct*.
>
> (emphasis added)

Roxborough was later referred and approved by the United Kingdom Supreme Court in *Barnes v. Eastenders Cash & Carry Plc And Others* [2015] AC 1.

[130] Closer to home, Hasnah Hashim FCJ in *Obata-Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Appeals* [2024] 8 CLJ 519; [2024] 5 MLJ 897 propounded at pp. 593 to 594 (CLJ); p. 969 (MLJ) as follows:

> [175] On the factual matrix of the appeals before us and guided by the principles as enunciated in *Dream Property*, in our judgment the purchasers as house buyers were fully aware of the terms of SPAs with the extended period with no objection, and had benefited as vacant possession delivered and, LAD payment was accepted. *The developers complied with the provisions of the law at that time and had not acted in any way unconscionably to the detriment of the interest of the purchasers.* It was only after *Ang Ming Lee* that the claims were filed years after delivery of vacant possession and payment of LAD. *Ang Ming Lee is not a carte blanche for purchasers to claim LAD retrospectively and to enjoy financial windfall.*
>
> [176] In the same vein, the same principles apply to *Sri Damansara*. *The second and third respondents shall not be entitled to remedies due to inequitable conduct of unconscionability, unjust enrichment and estoppel.* As we have stated above and we wish to reiterate that on the facts both the second and third respondents were fully aware of the stipulated extended period and did not challenge the validity of that extension approved by the Controller before the Tribunal nor before the judicial review at the High Court, only raising at the Court of Appeal.
>
> (emphasis added)

[131] Thus elucidated, the defendant is not entitled to pursue recovery on the basis of the equitable doctrine of total failure of consideration from the plaintiffs the amount of RM23,000,000 which amount had previously been declared by the High Court in Suits 396 and 88 as non-recoverable because it comprised part of an illegal moneylending transaction engaged in by the defendant and in which proceedings the defendant was declared an unlicensed moneylender. Similarly, the defendant is not entitled to pursue recovery on the same equitable principle for the same amount when the defendant was found by the High Court in the main suit from which the present appeals originate as the party who had caused the loss and on which loss he had based his claim of a total failure of consideration. In this regard, we agree with the submissions by learned counsel for the plaintiffs.

[132] Given the background, the Court of Appeal could not, in equity, order the plaintiffs to refund RM23,000,000 to the defendant. The Court of Appeal's failure to give any consideration to (i) the relevant surrounding circumstances of the defendant's use of the RM23,000,000 in his subsequent unilateral transaction with DA Land for Rawang 3 after having entered into the assignment agreement and the supplemental assignment agreement with the plaintiffs for Rawang 4 and (ii) the effects of the Shah Alam High Court judgment in Suits 396 and 88 on the defendant, constitutes a fatal misdirection warranting appellate intervention. Therefore, we answer questions 1 and 2 in the negative.

Appeal No. 23: Plaintiffs' Claim Over The Remaining RM2,500,000

[133] In the same fashion, we now deal with the following questions together:

(i) question 3: Whether the doctrine of a total failure of consideration could apply where there has been performance or part-performance of the contract, which in this case was the assignment of a sale agreement by the plaintiffs to the defendant, pursuant to which the defendant made part-payment thereof and received the benefit of the assignment?

(ii) question 6: Whether on its true principle the doctrine of a total failure of consideration has no application where there has been only a partial failure of performance or the claimant has derived some benefit from the contract so that he is restricted to an action in damages for breach of contract as opposed to restitution per *Phang Quee v. Virutthasalam* [1965] CLJU 131; [1965] 1 LNS 131; [1965] 2 MLJ 166; *Baltic Shipping Co v. Dillon* (1993) 111 ALR 289?

[134] Upon our perusal, question 3, in essence, seeks our determination as to whether a total failure of consideration may be recognised in law where there has been complete or partial performance from which the defendant has received the benefit of the assignment arising from his part payment under the contract. Question 6, in our considered view, is derivative of question 3 and similarly seeks our determination as to whether a total failure of consideration may be recognised in law where there has been a partial failure of performance or where the defendant has derived some benefit under the contract thereby entitling him to claim restitution. In that context, to our mind, questions 3 and 6 may be considered together as they entail a cause-based inquiry and an effect-based inquiry into the doctrine of total failure of consideration. In fact, the questions could have been merged. Read together, they direct our focus to the plaintiffs' performance under the assignment agreement and supplemental assignment agreement, and the purported benefit, if any, received by the defendant under the contracts.

[135] For a start, we wish to highlight that the common law has long made a distinction between total and partial failure of consideration and that courts have traditionally been reluctant to allow recovery for the latter. The weight of the authorities establishes that recovery on the basis of total failure of consideration will be denied where there has been performance or part performance of any contractual duties for which payment was made or where the claimant has derived some benefit from the contract as a result of such performance or part performance. There can be no refund of monies paid under a contract where there has not been a total failure of consideration

[136] Charles Mitchell, Paul Mitchel and Stephen Watterson, in their work, *Goff & Jones On Unjust Enrichment* (2022), (10th edn), Sweet & Maxwell observed at p. 467 as follows:

> The failure of basis must be total: **if even a very small part of the benefit which formed the basis for the payment has been conferred, no action will lie**.
>
> (emphasis added)

[137] Lord Porter in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 articulated at p. 77 as follows:

> **A partial failure of consideration gives rise to no claim for recovery of part of what has been paid**.
>
> (emphasis added)

[138] Similarly, Lord Sumner in *French Marine v. Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 AC 494 observed at p. 517 as follows:

> Here there was no total failure of consideration but a partial failure only, **for which in law no pro rata repayment could be claimed**.
>
> (emphasis added)

[139] In *Senanayake v. Annie Yeo* [1965] CLJU 163; [1965] 1 LNS 163; [1965] 2 MLJ 241, the Privy Council held that the plaintiff-respondent could not recover the full sum of $20,000 on the ground of total failure of consideration as the shares she had invested in, though not of the high value represented, were not entirely valueless. However, she was entitled to rescind the contract on the basis of misrepresentation and to recover the amount paid. Lord Morris of Borth-Y-Gest delivering the speech of the board observed at p. 244 as follows:

> *Their Lordships do not agree with the view that the plaintiff was entitled to recover her money on the basis that there had been a total failure of consideration. The evidence does not support a conclusion that the shares which in April the plaintiff agreed to buy were then worthless. There was evidence that even after the dissolution of the partnership there was value in and competition to acquire 'the seat, goodwill and assets of Sena & Goh'.* The seat referred to was the seat of the firm in the Malayan Sharebrokers' Association. Though the business of the firm was very different from the prosperous business it was represented to be it was nevertheless an existing business the shares in which were not shown to be valueless at the time in April when the plaintiff agreed to buy them.
>
> *In Their Lordship's view if the judgment in favour of the plaintiff is to be upheld it must be on the basis that the plaintiff elected to rescind her contract with the defendant and did rescind it at a time when she was entitled and able to do so and that accordingly she could recover her $20,000.*
>
> (emphasis added)

[140] In Australia, Mason CJ delivering the leading opinion of the High Court of Australia in *Baltic Shipping Co v. Dillon* [1993] 111 ALR 289 enunciated at p. 293 as follows:

> When, however, an innocent party seeks to recover money paid in advance under a contract in expectation of the entire performance by the contract-breaker of its obligations under the contract and the contract-breaker renders an incomplete performance, in general, *the innocent party cannot recover unless there has been a total failure of consideration. If the incomplete performance results in the innocent party receiving and retaining any substantial part of the benefit expected under the contract, there will not be a total failure of consideration*.
>
> *In the context of the recovery of money paid on the footing that there has been a total failure of consideration, it is the performance of the defendant's promise, not the promise itself, which is the relevant consideration. In that context, the receipt and retention by the plaintiff of any part of the bargained-for benefit will preclude recovery*, unless the contract otherwise provides or the circumstances give rise to a fresh contract.
>
> (emphasis added)

In that case, the claimant paid for a 14-day cruise but the ship sank after ten days. As she did not receive full performance under the contract, the company refunded her $787.50 of the $2,205.00 fare paid. However, she claimed damages and full recovery of the fare. In relation to the restitution of balance of the fare, Deane J and Dawson J added at pp. 315 to 316 as follows:

> *In circumstances where Mrs Dillon accepted and enjoyed the major portion of the pleasure cruise, however, there was no complete failure of the consideration for which she paid the fare. The catastrophe of the shipwreck and its consequences undoubtedly outweighed the benefits of the first eight complete days. It did not, however, alter the fact that those benefits, which were of real value, had been provided, accepted and enjoyed*.
>
> (emphasis added)

[141] This court too echoed the same principle in *Phang Quee v. Virutthasalam & Ors* [1965] CLJU 131; [1965] 1 LNS 131; [1965] 2 MLJ 166 where Thomson LP articulated the following at p. 166:

> In the circumstances the original contract embodied in the lease was at an end and, no breach having been alleged by either side, neither could then be under any contractual obligation to the other. Had there been complete failure of consideration, that is to say in simple terms had the plaintiffs, the lessees, had nothing for their money no doubt they would have had an action for what they had paid whether by way of premium or advance of tribute as for money had and received. *There had, however, been no such complete failure of consideration. They had something for the money and in the circumstances for the reasons set out by my Lord they can recover nothing*.
>
> (emphasis added)

[142] In the same vein, Barakbah CJM delivering supporting judgment of this court propounded the following at p. 167:

> *In order to succeed in an action for money had and received, the plaintiff had to prove that there was a total failure of consideration and the parties could be restored to their original position.* According to *Halsbury's Laws of England* 3rd Ed. Vol. 8 at page 243 paragraph 421:
>
> > Where a plaintiff has paid money in pursuance of his obligations under a contract, and the consideration for which he entered into the contract totally fails, he may either sue for damages for breach of contract, or bring an action for the return of the money so paid as money had and received to his use.
> >
> > *Where, however, the failure of consideration is not total but merely partial, then, unless the contract has been frustrated, the plaintiff is restricted to an action for damages for breach of contract.*
> >
> > *A complete failure of the consideration of a contract occurs where one of the contracting parties fails to receive some benefit or valuable consideration which springs from the root and is in the essence of the contract. If, however, he once receives such a benefit then he has no remedy in this form of action.*
>
> ...
>
> *In the present case the consideration was the tribute and there was no total failure of consideration as some tribute had been paid. Therefore in my opinion no action would lie for money had and received.*
>
> (emphasis added)

[143] Learned counsel for the defendant submitted that questions 3 and 6 are based on the premise that the plaintiffs had performed or partly performed their contractual obligation under the assignment agreement and the supplemental assignment agreement. It was argued that the fact that the defendant gets to deal directly with DA Land is not a benefit from the assignment agreement. According to learned counsel, plaintiffs have admitted in the consent judgment dated 2 June 2016 that they have no right, claim and caveatable interest over Rawang 4. It follows that the plaintiffs are not in a position to assign any right or interest in Rawang 4 to the defendant and have failed to perform the assignment agreement and the supplemental assignment agreement in their entirety despite full payment of RM23,000,000 has been made by the defendant.

[144] Further, it was submitted for the defendant that it was not the assignment agreement that entitled the defendant to deal directly with DA Land in respect of Rawang 3 but rather the defendant was constrained to do so as the assignment agreement and the supplemental agreement were tainted by illegality and amounted to a total failure of consideration. The eventuality of the defendant and DA Land signing the defendant's SPA does not amount to the plaintiff's performing any of their contractual duties pursuant to the plaintiff's SPA, the assignment agreement and the supplemental agreement.

[145] Learned counsel added, following the principles laid down in *Stocznia Gdanska SA* and *Berjaya Times Square*, regardless of the defendant's SPA, there is still total failure of consideration on the part of the plaintiffs in the assignment agreement and the supplemental agreement because cl. 3(ii) of the settlement agreement and para. 3(ii)(a) of the consent judgment, both of which entered into by the plaintiffs in their own volition, have resulted in the plaintiff's inability to perform any part of the assignment agreement and supplemental assignment agreement.

[146] With all due respect, we disagree. The plaintiffs had assigned their rights, title and interest in Rawang 4 and to the SPA to the defendant and had agreed that the lands be transferred directly from DA Land to the defendant. The consideration or basis for the payment of RM25,500,000 by the defendant was the said assignment with the knowledge and consent of DA Land. In that context, the plaintiffs had, therefore, performed their contractual duties under cl. 1 of the assignment agreement in respect of which the payment of RM25,500,000 was due. The defendant enjoyed the benefits of the assignment which (i) allowed him to deal directly with DA Land in respect of Rawang 4 though he then sought to enter into an SPA with DA Land without the knowledge of the plaintiffs, and (ii) enabled him to misapply the RM23,000,000 paid by the plaintiffs to DA Land under the plaintiffs' SPA as a deposit under the defendant's SPA with DA Land.

[147] For ease of reference, we reproduce para. [36] of the Court of Appeal's ground of judgment justifying the finding that there was a total failure of consideration on the part of the plaintiffs as follows:

> 36. It is clear that there was a total failure of consideration due to the following reasons:
>
> (1) according to Paragraph 3(ii)(a) Consent Judgment (Suit 688) and the Settlement Agreement (Parties in Suit 688), *the plaintiffs had no right, claim or caveatable interest in the 4 Lots (Rawang Land). The plaintiffs cannot now dispute the contents of Paragraph 3(ii)(a) Consent Judgment (Suit 688) and the Settlement Agreement (Parties in Suit 688). Accordingly, the plaintiffs were not in a position to assign absolutely any right or interest in the 4 Lots (Rawang Land) to the defendant under the Assignment (plaintiffs-defendant) and supplemental Agreement [Assignment (plaintiffs-defendant)]*; and
>
> (2) *the plaintiffs had actual knowledge of the Sale (DAL-Ho) regarding 1 Lot (Rawang Land)* please refer to the High Court's 1st Factual Finding. *The plaintiffs have not satisfied us that the High Court's 1st Factual Finding is plainly wrong. In view of the Sale (DAL-Ho), the plaintiffs could not assign absolutely their rights and interest in the 1 Lot (Rawang Land) to the defendant pursuant to the Assignment (plaintiffs-defendant) and supplemental Agreement [Assignment (plaintiffs-defendant)*].
>
> (emphasis added)

[148] Here, it is hoped that the effort invested in producing Diagram 2.0 will usefully clarify the actual timeline of events. We note that the settlement agreement dated 9 May 2016 and the consent judgment dated 2 June 2016 took place much later than the parties' entry into the assignment agreement dated 20 October 2015 which assigned the plaintiffs' SPA dated 23 June 2015 that expressly mentioned Ho's caveat over one parcel of Rawang 4. The defendant would have, by then, part-performed his consideration under the assignment agreement by making RM3,000,000 towards the differential sum of RM5,500,000.

[149] The moment the consent judgment was entered into, the plaintiffs had effectively assigned absolutely to the defendant all their rights, title, benefit and interest in Rawang 4 and to the SPA through the assignment agreement. Paragraph 3(ii)(a) of the consent judgment specifically stated that the plaintiffs admitted that they had no rights, claim or caveatable interest in Rawang 4. Therefore, learned counsel for the plaintiffs argued and we agree, that the consent judgment could not retrospectively mean that the plaintiffs were not in a position to assign absolutely any right or interest in Rawang 4 to the defendant as decided by the Court of Appeal. With all due respect, we are of the considered view the consent judgment, practically, reflects the true legal effect and factual position whereby, following the assignment agreement, all the plaintiffs' rights in Rawang 4 and their SPA had already been assigned to the defendant.

[150] Further, when the defendant entered into the SPA with DA Land on 24 May 2016 for the repurchase of Rawang 3, which was backdated to 1 October 2015 for reasons known only to them, the plaintiffs had no knowledge of and played no part in the transaction. Ho's caveat was disclosed to the defendant in the plaintiffs' SPA with DA Land. As alluded to above, s. 5 of the Second Schedule of the plaintiffs' SPA clearly stipulates that the obligation to remove Ho's caveat lies with DA Land, not the plaintiffs. In our considered view, the removal of Ho's caveat did not form part of the plaintiffs' contractual duties under the assignment agreement and the supplemental agreement.

[151] Therefore, to our mind, the plaintiffs had done everything on their part under the contracts. Performance was completed according to their terms. The defendant's contention that the assignment agreement and the supplemental assignment agreement were impossible to complete is without merit. In our judgment, there was no total failure of consideration as there had been performance or part performance by the plaintiffs of their contractual duties in respect of which payment was due under the assignment agreement and that the defendant had derived benefit from the same. With respect, the Court of Appeal's finding that there was a total failure of consideration is erroneous and cannot be sustained.

[152] Both the High Court and the Court of Appeal concurrently found the plaintiffs' SPA with DA Land, the assignment agreement and the supplemental assignment agreement to be valid. As alluded to above, upon careful analysis of the rulings, we reach the same conclusion. It follows that the rights and liabilities of the parties continued to be governed by the binding terms of the assignment agreement and the supplemental assignment agreement. Under cl. 2.2 of the supplemental assignment agreement, the sum of RM2,500,000 was to be treated as the plaintiffs' investment in Rawang 4 representing 4.5% of the value of the lands. We reproduce paras. [40] and [41] of the Court of Appeal's grounds of judgment, in relation to this clause, for ease of reference as follows:

> 40. Premised on the above judgment by Gummow J in *Roxborough*, *in view of the total failure of Consideration in this case, it is unconscionable for the plaintiffs to rely on the Assignment (plaintiffs-defendant) and supplemental agreement [Assignment (plaintiffs-defendant)] to claim for a sum of RM2,500,000.00 from the defendant. In fact, as found in the High Court's 1st Factual Finding, the plaintiffs had actual knowledge of the Sale (DAL-Ho). With such actual knowledge, the plaintiffs should not have entered into the Assignment (plaintiffs-defendant) and supplemental agreement [Assignment (plaintiffs-defendant)] in the first place. If the Original Action is allowed, the plaintiffs would be unjustly enriched in a sum of RM2,500,000.00 when the plaintiffs cannot assign absolutely any right or interest in the 4 Lots (Rawang Land) to the defendant under the Assignment (plaintiffs-defendant) and supplemental agreement [Assignment (plaintiffs-defendant)]*.
>
> 41.The Original Action should be dismissed with costs on the ground stated in the above paragraph 40. *We should add that we do not share the view of the learned High Court Judge on why he had dismissed the Original Action, ie, the High Court's 2nd Factual Finding (defendant had not breached the Assignment (plaintiffs-defendant) and supplemental agreement [Assignment (plaintiffs-defendant)]*.
>
> As decided by Gummow J in *Roxborough*, the Original Action is dismissed not because there was no breach of the Assignment (plaintiffs-defendant) and supplemental agreement [Assignment (plaintiffs-defendant) by the defendant but *because it was unconscionable to allow the plaintiffs to claim RM2,500,000.00 from the defendant. In other words, even if it is assumed that the defendant had breached the Assignment (plaintiffs-defendant) and supplemental agreement [Assignment (plaintiffs-defendant)], the court should nonetheless refuse to allow the plaintiffs' unconscionable claim of RM2,500,000.00 against the defendan*t.
>
> (emphasis added)

[153] The Court of Appeal dismissed the plaintiffs' claim on the ground that it was unconscionable to allow the plaintiffs to claim RM2,500,000 from the defendant. As we now find that there is no total failure of consideration and there was no basis for the Court of Appeal to make a finding of unconscionability against the plaintiffs, we are of the considered view that the defendant breached the assignment agreement by entering into the SPA with DA Land for Rawang 3 which the Shah Alam High Court in Suits 396

and 88 later held to be an illegal moneylending transaction and thus unenforceable and which, in turn, resulted in the defendant losing all rights, interest and title to the lands in Rawang 3, without which Rawang 4 could not exist.

[154] Through the aforesaid actions, the defendant had deprived the plaintiffs of the benefit they were entitled to as consideration for assigning their rights to Rawang 4, namely RM2,500,000 which represented their investment in Rawang 4. The plaintiffs suffered this loss due to the defendant's breach of the assignment agreement and his unilateral dealings with DA Land. Following the defendant's breach, no investment in Rawang 4 could ever materialise.

[155] Therefore, in the premises, questions 3 and 6, read and considered collectively, must be answered in the negative.

The True Test And Scope Of Total Failure Of Consideration

[156] We shall now determine the remaining questions:

(i) question 4: Whether the true test of a total failure of consideration is as stated by the House of Lords in *Stocznia Gdanska SA v. Latvian Shipping Co.* (1998) 1 WLR 574 per Lord Goff of "whether the promisor has performed any part of the contractual duties in respect of which payment is due" (p. 588) and not the test of "whether the party in default has failed to perform his promise in its entirety" as stipulated by the Federal Court in *Berjaya Times Square Sdn Bhd v. M Concept Sdn Bhd* [2010] 1 CLJ 309; [2010] 1 MLJ 597 at 609?

(ii) question 5: Whether the case of *Berjaya Times Square (supra)*, relied on by the Court of Appeal has wrongfully conflated the right of rescission of a contract with the right to seek restitution of monies paid and received (which is independent of rescission or termination of a contract) and is therefore not truly classifiable as an authority for the doctrine of restitution based on a total failure of consideration?

[157] Learned counsel for the defendant submitted that there is no issue with the test for total failure of consideration as applied by this court in *Berjaya Times Square* which was derived from *Stocznia Gdanska*. The tests laid down in *Stocznia Gdanska* and *Berjaya Times Square* are, according to learned counsel, two sides of the same coin, *albeit* expressed differently. It was further submitted that the learned panel of the Court of Appeal made a finding of fact that there was a total failure of consideration on the part of the plaintiffs after having considered the authorities in *Berjaya Times Square* and *Damansara Realty*.

[158] According to the defendant, *Damansara Realty* supplements *Berjaya Times Square* and fills the gap left in the latter in that there can still be a total failure of consideration even where the contract has been partly performed provided that such performance has little or no value. It follows that *Damansara Realty* does not conflict with *Berjaya Times Square* but rather operates in conjunction with it. Learned counsel further submitted that this court, in *Berjaya Times Square*, did not lay down a single sweeping proposition that conflated the right of rescission of contract with the right to seek restitution regardless of the circumstances.

[159] With all due respect, as we have endeavoured to highlight in the earlier part of this judgment, our analysis of *Berjaya Times Square* suggests otherwise. Additionally, the weight of academic literature further demonstrates a unified body of thought in support of our view. As alluded to above, the true test of a total failure of consideration is as stated by the House of Lords in *Stocznia Gdanska* per Lord Goff, "the test is not whether the promise has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which payment is due" and not the test of "whether the party in default has failed to perform his promise in its entirety" as stated by this court in *Berjaya Times Square.*

[160] We wish to further add that Lord Goff's formulation of the test is consistent with the earlier observation made by Viscount Simon in *Fibrosa Spolka Akcyjna* who stated at p. 48 that a failure of consideration refers to the failure of performance of the promise:

> In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act – I am excluding contracts under seal – and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration, *but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.*
> (emphasis added)

[161] This court in *Goh Yew Chew & Anor v. Soh Kian Tee* [1969] CLJU 47; [1969] 1 LNS 47; [1970] 1 MLJ 138 through the observation of Ali FCJ at p. 142 applied the principles laid down in *Fibrosa Spolka Akcyjna* as follows:

> ... the learned trial judge has found on the facts that the contract was *void ab initio* in the sense that there has been a total failure of consideration. *On the principle stated by Viscount Simon L.C. in the Fibrosa case*, already referred to in this judgment, this is sufficient ground for dismissing this appeal. But in fairness to the appellants it has to be stated here that the finding on issue No. (1), so far as this was in their favour, can by no

A means be of much assistance to them. *The fact that they have made an extension to the bridge and constructed a store for the purposes of transporting and storing building materials can hardly constitute part performance of the contract. There was no evidence that construction work on the proposed buildings has actually started.*

(emphasis added)

B

[162] Elsewhere, the test in *Stocznia Gdanska* has been consistently applied in its proper form. In *Shanghai Tongji Science & Technology Industrial Co Ltd v. Casil Clearing Ltd* [2004] HKCU 380, the Hong Kong Final Court of Appeal ruled that the relevant performance by the defendant, in order to obtain the benefit of the letter of credit (the "L/C") opened by the plaintiff, was the tendering of conforming documents to the paying bank for payment. On the facts, the defendant did tender conforming documents. Accordingly, there was no total failure of consideration. Applying *Stocznia Gdanska*, the relevant performance by the defendant was assessed against the specific transaction through which the benefit was received. Mr Justice Ribeiro PJ delivering the judgment of the court articulated as follows:

C

D

79. *'Consideration' in the context of a restitutionary claim based on total failure of consideration is the anticipated performance for which the money was paid, or the 'basis or purpose' of the payment.*

E ...

80. It is accordingly crucial correctly to identify and characterise the transaction providing the basis for the defendant's enrichment. Only then can one identify the relevant anticipated performance and ascertain whether it has totally failed.

F 81. Thus, in *Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 WLR 574, once it was determined that the performance required of the shipyard was not merely to transfer property in the vessels, when built, to the buyers, but instead, to design, build, complete and deliver them in accordance with the agreed specification, it became clear that the shipyard had in fact rendered part of the expected performance, thereby excluding a claim

G based on total failure of consideration ...

82. Tongji's formulation focuses on the 'opening of the L/C' as the enrichment and postulates as the performance to be rendered in return, entry into a sale contract with Casil.

H 83. However, merely opening the L/C did not constitute the relevant or any enrichment. Casil was enriched by its receipt of money from Sin Hua upon negotiation of its draft and tender of conforming documents in accordance with the L/C's terms. If Casil had made no such tender or if it had tendered non-conforming documents, it would not have received any payment. The relevant transaction therefore embraces the entire L/C transaction terminating in Casil's receipt of the L/C's proceeds.

I

84. *Therefore, the consideration for the purposes of a claim in restitution arising out of this transaction must include Casil's tender of conforming documents as an unseverable part of the performance forming the basis of the payment. Such performance was duly rendered so there was no total failure of consideration. Moreover, in consequence of Casil's tender, the bills of lading came into Tongji's hands and were exchanged by Tongji for delivery orders which it then handed to Madam Sung in return for Ganzhou's post-dated cheque, with a view to improving its security vis-à-vis Madam Sung. The fact that the cheque was subsequently dishonoured and that the contents of the container turned out to be of insignificant value do not affect this conclusion.*

(emphasis added)

[163] In *Benzline Auto Pte Ltd v. Supercars Lorinser Pte Ltd And Another* [2018] 1 SLR 239, Judith Prakash JA delivering the judgment of the Singapore Court of Appeal propounded at pp. 260 to 262 as follows:

[48] *First, it is important not to confuse "consideration" in the familiar contractual sense with "consideration" or "basis" in the law of unjust enrichment. Consideration in contract law refers to a counter-promise given in exchange for a promise. But in the law of unjust enrichment, consideration/basis refers to one of two things.*

[49] In the promissory sense, consideration/basis is the performance of a counter-promise, to be distinguished from the counter-promise itself: see *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 ("*Fibrosa*") at 48. This is only logical: *when a party performs its part of the bargain, it does so not in reliance on the mere legal existence of the counter-promise, but rather in the expectation that the counter-promise will actually be performed*. As the House of Lords put it in *Fibrosa* (at 48), in the context of a payment made on a contract which was frustrated, "[t]he money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled".

...

[51] Secondly, *not every expectation which a party has in making a transfer forms part of the basis of that transfer. The basis of a transfer must be objectively determined based on what is communicated between the parties; the parties' uncommunicated subjective thoughts are irrelevant*: see Goff & Jones at para 13-02 ...

[52] Thirdly, although it is usual and convenient to refer to the basis of a transfer, the reality is that, as the learned authors of Goff & Jones observe at para. 13-14, a transfer may have more than one basis ...

[53] *Having identified the basis of the transfer, the next step is to determine whether that basis has failed. The prevailing position is that the failure must be total, not partial. The exception, if it can be called one, is where a contract is divisible such that it can be said that there has been a total failure of the consideration for/basis of a discrete part of that contract*: see *Max Media FZ LLC v. Nimbus Media Pte Ltd* [2010] 2 SLR 677 at [24], citing Fibrosa at 77"

(emphasis added)

[164] In a nutshell, we agree with learned counsel for the plaintiffs that the judicial focus of the inquiry must remain on the performance of the anticipated promise which formed the basis for the transfer of the relevant benefit or for which payment was due or made. Therefore, learned counsel argued and we agree, that the law took a different course following *Berjaya Times Square* and *Damansara Realty* in so far as the doctrine of total failure of consideration is concerned and conflating it with the right to rescind or terminate a contract. We agree that these rulings have conflated the doctrine of total failure of consideration for recovery of monies paid with recovery for breach of contract based upon termination or rescission. Accordingly, these rulings leave the application of the doctrine of total failure of consideration in a state of uncertainty of the principles and tests applicable for both (i) rescission or termination of a contract for breach and (ii) restitution in cases of a total failure of consideration. In our considered view, the law must be clarified.

[165] Learned counsel for the plaintiffs has implored us, learned counsel for the defendant has stated their position, and academics and scholars have urged reconsideration. In view of these, we find it necessary to respond. Upon careful analysis and anxious reflection, we are of the considered view that *Berjaya Times Square* can no longer be regarded as good law.

[166] In the premises, we answer questions 4 and 5 in the affirmative.

The Extent Of The Appealable Errors

[167] For clarity, we wish to reiterate that the appealable errors discussed above did not arise from the Court of Appeal's application of the version of the test of total failure of consideration as formulated in *Berjaya Times Square* and *Damansara Realty*. In so far as relevant, the errors in effect arose from the Court of Appeal's determination that the law of restitution applies notwithstanding the continued existence of the binding assignment agreement and the supplemental assignment agreement; a position which we respectfully disagree with. In approaching the related issue of the applicability of the law on restitution, we are then duty-bound to revisit the true test and contours of the doctrine of total failure of consideration as implored by learned counsel for the plaintiffs.

[168] As we have seen in our jurisdiction, the Court of Appeal and the High Court are bound by precedent set by this court even where they may strongly disagree with it. With respect, we are guided by this court's ruling in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113 where Augustine Paul FCJ enunciated at pp. 204 to 205 (CLJ); p. 132 (MLJ) as follows:

> The judge "is therefore correct in saying that *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* [2000] 4 MLJ 1 and *Capital Insurance Bhd v. Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 were wrongly decided. *Unfortunately, he is*

> *not the right authority permitted by law to express such an opinion. As both cases are judgments of the Federal Court, he is bound to follow them whether he agrees with them or not. The stand taken by him is in blatant disregard of the doctrine of stare decisis* particularly when the need to comply with this fundamental rule of the common law was brought to his attention ...
>
> (emphasis added)

Changes To The Existing Legal Landscape

[169] For completeness, to borrow the words of Lord Denning in *British Movietonews Ltd v. London And District Cinemas Ltd* [1952] AC 166, we wish to add that it does not take a genius with the "foresight of a prophet" to recognise that the change of law on the test for the doctrine of total failure of consideration, brought about following this judgment applies to these appeals and will affect all pending litigations which have yet been finally determined currently proceeding on the basis of *Berjaya Times Square*. In that course, however, we think that uncertainties abound and that significant unfairness may arise to the parties involved if the law were to be applied retrospectively.

[170] On this point, Lord Nicholls of Birkenhead in *In Re Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41 observed at pp. 695-696:

> 26 ... **The retrospective nature of a court ruling on a point of law means that the ruling applies in all cases, past as well as future. This is subject only to defences of general application, such as limitation, laches, and *res judicata*.**
>
> (emphasis added)

[171] His Lordship then continued at p. 699:

> 40 Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. *There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions.*
>
> (emphasis added)

[172] Closer to home, Richard Malanjum CJSS (as His Lordship then was) when delivering the Federal Court ruling in *Ling Peek Hoe & Anor v. Ding Siew Ching & Another Appeal* [2017] 7 CLJ 641; [2017] 5 MLJ 385 opined at pp. 394 to 395 as follows:

> [25] The rationale of the principle of prospective overruling was clarified by the Indian Supreme Court in the case of *Sarwan Kumar v. Madan Lal Aggrawal 2003* AIR 1475 (SC) at p 1481 in these words:

> 13 ... Under the doctrine of 'prospective overruling' the law declared by the court applies to the cases arising in future only and its applicability to cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. Invocation of doctrine of 'prospective overruling' is left to the discretion of the court to mould with the justice of the cause or the matter before the court.
>
> ...
>
> [28] *Thus, 'the law declared by the court applies to the cases arising in future only and its applicability to cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence'*. The emphasis is on future cases and it does not affect cases that have attained finality ...
>
> (emphasis added)

[173] In *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal* [2021] 10 CLJ 206; [2021] 6 MLJ 619, similar sentiment is also visible where this court through the judgment delivered by Hasnah Hashim FCJ (as Her Ladyship then was) stated at p. 637 as follows:

> [37] Learned counsel for Plenitude relied on the case *Cubic* and submitted that there is no necessity for the plaintiff to prove of actual loss or damages as the innocent party of the breach it seeks to enforce a damages clause. *Cubic* introduced a new burden, shifting the onus to the defendant, in this case, Tekun to prove that the damages claimed by Plenitude is unreasonable and unconscionable. This, according to learned counsel for Plenitude, Tekun failed to do. Learned counsel for Tekun in response argued that Tekun had presented and argued its case in the High Court based on burden of proof applicable at the material time where Plenitude bears the onus to prove the actual loss.
>
> [38] If *Cubic* is applicable, Tekun must adduce evidence to prove that the damages claimed by Plenitude is unreasonable. The onus of proof in relation to s. 75 of the CA at that material time lies on Plenitude, following *Selva Kumar* and *Johor Coastal*. *Cubic should not be applicable retrospectively to cases where full trial has completed and decided by the court of first instance. The Court of Appeal had decided based on the law applicable at that material time. In this case, the retrospectivity of Cubic will cause manifest injustice to Tekun. Therefore, it stands to reason that Cubic will only apply prospectively. That is, to cases where trials have not been completed.*
>
> (emphasis added)

[174] Thus elucidated, it is our view that Malaysia's position on the test for the common law restitutionary doctrine of total failure of consideration, as clarified in this judgment, should apply prospectively.

Conclusion

[175] In the upshot, the legal position could be stated as follows:

(i) the expression "rescission" is commonly used in two different contexts. On the one hand, it may denote the process by which a contract, containing an inherent cause of invalidity, is set aside in such a way that not only does the contract cease to exist but it is deemed never to have existed. This process is more properly described as "rescission *ab initio*" and is the more correct usage of the term "rescission". An example is where a contract is set aside on the ground that it was induced by misrepresentation;

(ii) on the other hand, the expression "rescission" may also be used to describe the situation where a contract that is otherwise entirely valid, containing no inherent cause of invalidity, suffers from a serious breach or where the innocent party treats the breach as a repudiation and accepts it, thereby bringing the contract to an end and releasing both parties from further obligations. This process is more properly described as "rescission for breach" or "termination". In this situation, there is no doubt that the contract subsisted up until the moment of termination;

(iii) for a breach to have the effect of entitling the innocent party to terminate the contract, it must be either (a) a breach of a condition; (b) a sufficiently serious breach of an innominate/intermediate term; or (c) a repudiation of the contract;

(iv) the legal principles governing the award of restitutionary remedies has no application in determining whether a contract should be terminated for breach. The law of restitution and unjust enrichment becomes relevant after a contract has been discharged, rescinded or terminated; and

(v) a claim for restitution is available when there is a total failure of consideration. The applicable test for total failure of consideration is not whether the promisee has received a specific benefit but rather whether the promisor has performed any part of the contractual duties in respect of which payment is due (*Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 WLR 574).

[176] Therefore, we take the view that the Court of Appeal misdirected itself in concluding that the plaintiffs are liable to return the sum of RM23,000,000 to the defendant and that the plaintiffs are not entitled to claim the remaining RM2,500,000 under the assignment agreement and the supplemental assignment agreement from the defendant. The conclusions reached cannot

be justified in law and in fact and they warrant our appellate intervention. For the reasons given above, we have reached the conclusion that both of the plaintiffs' appeals must be allowed. We also ordered costs to be paid to the plaintiffs.

[177] We thank both learned counsel for their erudite written submissions which we have carefully perused having spent a good deal of time on them and for their helpful oral submissions which we followed closely during the proceeding in reaching this unanimous decision. We have been greatly assisted by their efforts, professionalism and courtesy throughout the matter.